# Anti-social Behaviour and Civil Preventive Measures: Creating Localised Criminal Codes?

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This thesis is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

University of Sussex

August 2017

# Declaration

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature:……

# Abstract

This thesis examines the implementation of anti-social behaviour (ASB) tools and powers in England and Wales. The main focus of this thesis is to assess how the 2014 amendments to the ASB regime have been implemented and to explore whether this resulted in the indirect criminalisation of certain kinds of behaviour. Although, in theory, the rationale underpinning these measures (such as the Part 1 injunction) is the prevention of further ASB, the ambiguous drafting of the relevant legislation in conjunction with the significant degree of discretion granted to local enforcement agents appear to allow for the imposition of sanctions akin to criminal punishment. Central to this thesis is the assumption that despite the preventive nature of these measures, it is essential to look beyond the official classification of legal rules (ie, ASB rules as non-criminal) and investigate how these have been implemented in practice. To achieve this, a working definition of criminalisation is formulated in order to determine whether the rules in question should be regarded as criminal or non-criminal.

The theoretical analysis of criminalisation and of the relevant legislation relating to ASB was complemented by empirical data collected through twenty-nine interviews in two counties in England. As part of the empirical study, semi-structured interviews with local practitioners and police officers were conducted.

The findings of this research do not only shed light on the implementation of the 2014 amendments, but they also challenge a number of preconceptions regarding criminalisation and the administration of ASB. This research found that in most cases the implementation of these measures did not result in the indirect criminalisation of ASB based on the working definition of criminalisation formulated in this thesis. The study found that although the administration of ASB is primarily risk-driven, it was also informed by a number of other factors, such as the need to address the underlying causes of the behaviour in question. However, the study also found that there was, in some cases, scope for the implementation of ASB measures to be used as a means of criminalisation. This meant that non-criminal conduct could be criminalised indirectly.

# Acknowledgements

I would like to thank my supervisors, John Child and Mark Walters, for their continued support throughout my doctorate. Their support, commitment and determination have been inspirational. Their extensive knowledge in criminal law and criminal justice has been really important to this thesis since it significantly enhanced my understanding of criminalisation and ASB. Their thorough and constructive feedback has enabled me to examine these issues from a number of different perspectives and has contributed significantly to my intellectual development. I would also like to thank Laurence Koffman who supervised me during the initial stages of my doctorate. His guidance, support and extensive knowledge in ASB were vital to the development of this thesis. I will always be grateful for everything my supervisors have done for me and I am really glad that I had chosen the University of Sussex for my doctorate.

I would also like to express my appreciation for all of those organisations and people who participated in the empirical study. Their contribution to this thesis was exceptional. I am aware of the fact that they had to give away some of their precious time in order to participate in this research and I am really grateful for this. Although their hard work is rarely appreciated, I would like to thank them for their efforts to enhance the quality of life of their local communities and for tackling criminality and ASB.

I am really grateful to my parents, Demetris and Elena, and my siblings, Haralambos and Myria, for their love and all the sacrifices they had to make in order to support my studies. I would also like to thank my grandparents and friends who always believed in me and stood by my decisions. Above all, I would like to thank my wife and best friend, Lyto, for her patience and everything she has done for me during this amazing journey. Lyto has always been there for me offering her unconditional love, support and encouragement. There are no words to express my gratitude for everything my family did for me during these years. This thesis is dedicated to them.

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# List of abbreviations

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| ABC | Acceptable Behaviour Contract |
| ASB | Anti-social behaviour |
| ASBI | Anti-social Behaviour Injunction |
| ASBO | Anti-social Behaviour Order |
| CBO | Criminal Behaviour Order |
| CJS | Criminal justice system |
| CPS | Crown Prosecution Service |
| CrASBO | Post-conviction Anti-social Behaviour Order |
| CSP | Community Safety Partnership |
| CSU | Community Safety Unit |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| GBH | Grievous bodily harm |
| HRA 1998 | Human Rights Act 1998 |
| RJ | Restorative justice |
| TPIMs | Terrorism Prevention and Investigation Measures |

# Introduction

The criminal law does not only seek to punish those who have committed offences, but it also aims to prevent the commission of crime (Ashworth, 2007-2008). This preventive function of the criminal law is premised on the assumption that if we accept, for example, that the unlawful infliction of grievous bodily harm (GBH) is worth criminalising, then there is reason for us to prevent this from happening in the first place (Ashworth & Zedner, 2015). As Duff (1997) puts it, it would be morally problematic if we criminalise the unlawful infliction of GBH, but fail to criminalise those who attempt to inflict this kind of harm on others.

Pre-emptive interventions by the criminal law are most evident in the context of legislation targeting terrorism related activities (Wells & Quick, 2010). A prime example of this is section 58(1)(b) of the Terrorism Act 2000 which criminalises the possession of any document which can facilitate the commission of an act of terrorism.[1] This offence can be justified on the ground that, in light of the risk posed by terrorism, it would be unreasonable for the state not to intervene prior to the commission of a terrorism related activity. Pre-emptive criminalisation, therefore, 'facilitate[s] intervention at an earlier stage, with no requirement that the substantive harm results at all' (Child & Hunt, 2010: 54). The core of the debate in this area, of course, is to identify when conduct becomes sufficiently proximate to a harm to warrant criminalisation in its own right.[2]

Legal pre-emptive interventions in England and Wales, however, extend beyond the frontiers of the criminal law. This can be attributed primarily to the introduction and rise of the civil preventive measures. Some of the most well-known examples of these measures include the Anti-social Behaviour Order (ASBO) and the Control Order.[3] Similar to pre-emptive criminalisation, the impetus for the introduction of these measures was the prevention of certain undesirable kinds of conduct. The former, for instance, aimed at the prevention of ASB and the latter aimed at the prevention of terrorism-related activities.

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[1] For an analysis of this offence see Hodgson and Tadros (2009).
[2] For more on this debate see 2.2.3.
[3] Both of these orders have now been repealed by the new civil injunction under Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014 and the Terrorism Prevention and Investigation Measures 2011 respectively.

In contrast with pre-emptive criminalisation, civil preventive measures formally lay outside the ambit of the criminal law. As Ashworth and Zedner (2010) point out, the main objective of these measures is not to punish people for their past wrongdoing, but to impose certain restrictions on their liberty in order to prevent them from engaging in similar activities in the future and/or causing future harm. The fact that these measures formally lay outside the ambit of the criminal law means that they offer more flexibility to law enforcement agents since they are not restrained by the same procedural and evidential rules that are so important to restrict criminal rules. As explained below, although these measures have been labelled as not criminal, in theory, they appear to allow for the imposition of restrictions akin to criminal punishment.[4] What is, therefore, concerning about these restrictions is that they are imposed in the absence of the 'enhanced procedural protections' guaranteed to those facing criminal prosecution (Henry & King, 2016).[5]

Although the prevention of certain undesirable events 'is a laudable and defensible role of the state' (Ashworth & Zedner, 2015: 82), this does not necessarily warrant the imposition of sanctions akin to criminal punishment in the absence of the enhanced procedural protections. As Loader (2008: 405) maintains, as members of a contemporary liberal society, we should not only focus on what kinds of behaviour should be controlled and prevented, but we should also be mindful of '*how* we do so' (emphasis in the original). For Steiker (1998), if these measures result in the imposition of criminal punishment, then it is essential to subject them to the same constraints and level of theoretical critique as criminal rules.

The first challenge faced by legal theorists, therefore, with regard to the civil preventive measures, relates to the label attached to them by the legislature and whether these measures are indeed civil in nature. For those legal philosophers who believe that the label attached to a legal rule should not distract us from examining whether, in fact, the restrictions imposed amount to criminal punishment, it is necessary to identify the conditions under which these measures are truly criminal (Steiker, 1998). In cases where

[4] I elaborate further on what qualifies as criminal punishment in 3.2.

[5] The term 'enhanced procedural protections' is used by Hendry and King (2016) to describe all of those extra procedural and evidential safeguards afforded under both domestic legislation and the European Convention on Human Rights to those facing criminal prosecution. For more on the importance of the 'enhanced procedural protections' see 'The pre-2014 approach to anti-social behaviour'.

these conditions have been met, the next issue to be addressed relates to the legitimacy of this form of regulation.

The above are some of the broader philosophical challenges posed by civil preventive measures in general. This thesis engages with the abovementioned challenges using the law relating to ASB as its primary case study. The main reason for choosing this area of law as a case study lies with its wide application and extensive use. In contrast to other civil preventive measures, such as the Terrorism Prevention and Investigation Measures (TPIMs), ASB can be more far-reaching since it can range from conduct which is unregulated and/or falls within the realm of everyday human interaction (e.g. noisy neighbours) to behaviour that already constitutes a criminal offence (e.g. criminal damage) (Field, 2003). This is evident from both the number[6] and the diversity[7] of ASB incidents reported and/or witnessed each year by the public.

**Anti-social behaviour in England and Wales**

Before trying to address the abovementioned philosophical issues, it is important to provide an overview of the law relating to ASB in order: (i) to lay the foundations for our discussion in the rest of this thesis; and (ii) to illustrate why it is imperative to engage with these issues.

The pre-2014 approach to anti-social behaviour

The first major legislative attempt to tackle ASB as a specific concept was the introduction of the ASBO under section 1 of the Crime and Disorder Act 1998 (1998 Act).[8] In 2002, the post-conviction ASBO (CrASBO) was introduced as well under section 64 of the Police Reform Act 2002 (2002 Act).[9] The ASBO constituted a 'two-step criminalisation process' where a 'civil prohibitory order' was issued (Simester & von Hirsch, 2001: 213); and breach of the order without any reasonable excuse constituted a

[6] Evidence suggests that almost 2 million incidents of ASB have been recorded in England and Wales between April 2014 and March 2015. See Office for National Statistics, 2015.
[7] According to the Crime Survey for England and Wales, public's perception as to what constitutes ASB can vary considerably and it can include amongst other begging, groups of people hanging around on the street and drug dealing. See: Office for National Statistics, 2016.
[8] Prior to the introduction of the ASBO local authorities could and still can make use of the powers granted to them under section 2 of the Noise Act 1996 in order to deal with nuisance behaviour. Under section 152 of the Housing Act 1996, an anti-social behaviour injunction (ASBI) could be issued against someone whose behaviour had caused 'nuisance and annoyance' in residential premises. Moreover, an array of provisions in the Public Order Act 1986, such as section 5, enables law enforcement agents to tackle more serious kinds of public disorder. None of these measures, however, was explicitly designed to address what later became known as ASB.
[9] Section 1C.

criminal offence carrying a maximum sentence of five years imprisonment and a fine.[10] If someone's behaviour 'caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself', then one of the 'relevant authorities' listed under section 1 of the 1998 Act, such as the police, could submit an application to court for the issue of an ASBO against that individual. If the court examining the application submitted was satisfied that the perpetrator behaved in an anti-social manner, it could then approve the imposition of any restrictions deemed 'necessary' on the perpetrator in order to prevent him from engaging in further ASB,[11] as long as there was also a 'practical way of policing the order' (*Boness and others [2005] EWCA Crim 2395* (para. 48)). Some of the most common types of restrictions imposed on those against whom an ASBO was issued included, amongst others, curfews, exclusion from particular areas and 'prohibitions on certain kinds of conduct' (Bakalis, 2007: 427). It is also important to note that ASBOs were issued for a minimum period of two years.[12]

Despite the fact that these restrictions could have a significant and longstanding effect upon the perpetrator's liberty, proceedings for the issue of an order were deemed by the House of Lords in *R. (on the application of McCann) v Manchester Crown Court [2002] UKHL 39* to be civil rather than criminal in nature. As noted above, the importance of this classification, either criminal or civil, lies in the enhanced procedural protections guaranteed to those charged with a criminal offence, particularly those under Article 6 of the European Convention on Human Rights (ECHR) (King, 2014).[13] Nonetheless, it is worth noting that the House of Lords held that the court examining an application for the issue of an ASBO should have been satisfied beyond any reasonable doubt (i.e. the criminal standard of proof) that the defendant's behaviour 'caused or [was] likely to cause harassment, alarm or distress' (para. 37).

In determining the nature of the ASBO's first limb, the House of Lords did not simply focus on the official classification of the order, but it paid particular attention to the underlying rationale for the introduction of this hybrid form of regulation.[14] For the

[10] Section 1(10) and section 1(10)(b) respectively.
[11] Section 1(6).
[12] Section 1(7).
[13] The purpose of Article 6 of the ECHR is to guarantee that those facing criminal prosecution are given a fair trial. To achieve this, those charged with the commission of a criminal offence are entitled to a number of rights, such as the right to examine all evidence against them (Article 6(3)(d)).
[14] In determining the nature of the ASBO's first limb, the House of Lords applied the anti-subversion doctrine formulated by the European Court of Human Rights (ECtHR) in Engel v Netherlands (1979-1980) 1 E.H.R.R. 647 (para. 81-82). As explained in more detail in 3.1.2, the anti-subversion doctrine constitutes

Labour party (1995), which was the main driving force behind the introduction of the ASBO when it came to power in 1997 (the New Labour government), the link between ASB and criminality was undeniable, but they did not believe that such conduct should be criminalised in its own right. For this reason, a new method of social regulation was needed in order to enable the state to intervene at an early stage and prevent ASB from escalating to serious criminality (Crawford, 2009; Squires, 2006; Jacobson, Millie & Hough, 2008).

In line with the Labour party's rhetoric, the House of Lords held that the primary intention of the legislature was to introduce a civil order which aimed at the prevention of certain kinds of behaviour rather than their criminalisation (para. 72). This was crucial to the Lords' decision that the order was civil in nature (para. 27). It was noted, however, that despite the civil nature of this order, in cases where the restrictions imposed on the perpetrator's liberty were severe, then, the standard of proof applicable should be the criminal standard, i.e. beyond any reasonable doubt, rather than the civil one, i.e. on the balance of probabilities (para. 37). It follows that in *McCann* the preventive nature of the ASBO was sufficient to warrant the imposition of any restrictions deemed necessary on a perpetrator, despite the absence of many enhanced procedural protections, such as the right 'to examine or have examined witnesses against him'.[15]

This perceived need for an early intervention was also reflected in the drafting of the ASB legal framework. There was no need within the 1998 Act, for instance, to prove that someone's behaviour had actually caused 'harassment, alarm or distress'.[16] Instead, the institution applying for the issue of an ASBO needed only to prove that the defendant's behaviour was *likely* to cause any of the abovementioned results. In theory, however, this meant that: (i) severe restrictions could be imposed on someone's liberty even if his behaviour had not actually caused 'harassment, alarm or distress' to any other person; and (ii) one could face a lengthy custodial sentence simply for breaching a civil order (Pearson, 2006).

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a three-stage test based on which courts can determine whether the legal rule in question should be regarded as criminal in nature (and thus trigger all the enhanced procedural protections) regardless of the label attached to it by the legislature.

[15] Article 6(3)(d) of the ECHR.

[16] As it will be explained below this is still the case under the current law. See 'The current law on anti-social behaviour'.

For the proponents of this hybrid form of regulation, alongside prevention, another important reason for its introduction was the alleged inability of the criminal law to deal swiftly and effectively with ASB. As Prime Minister Tony Blair (2006) contended, victims of ASB were often left unprotected from low-level criminality and their only hope was the criminal law which was, however, not sufficiently adequate for this purpose primarily for two reasons. First, the fact that the criminal law paradigmatically focuses on isolated events rather than on the cumulative impact of a series of incidents meant that no permanent relief could be provided to those experiencing prolonged low-level criminality (Koffman, 2006). Secondly, the criminal justice system (CJS) was deemed to be particularly costly and time consuming for dealing with low-level criminal activities and ASB (Chakrabati & Russell, 2008). This can be partly attributed to the enhanced procedural protections afforded to those facing criminal prosecution. Criminal law's evidential and procedural rules posed a number of barriers in the battle against ASB. The exclusion of hearsay evidence,[17] for example, could be a significant disincentive for people to report ASB incidents (Home Office, 2011b). As Sanders and Jones (2007: 282) contend, giving evidence in court can be a very daunting prospect for victims who might regard this as a form of 'secondary victimisation'. Another significant hurdle is the high standard of proof applicable in criminal proceedings which makes prosecution more difficult. The above considerations provided the basis for an alternative method of social regulation (Koffman, 2006). In an attempt to combine the flexibility of the civil law and the deterrent effect of the criminal law,[18] a hybrid approach was deemed to be the most suitable solution (Squires, 2008).

Although providing relief to victims and the prevention of further ASB appear to be legitimate objectives for the state to pursue, the adoption of this hybrid form of regulation in conjunction with the extensive degree of discretion granted to local enforcement agents were heavily criticised.[19] One of the main criticisms raised against the ASBO was its ability to effectively criminalise what local communities regarded as intolerable behaviour, albeit not conduct proscribed by criminal law. Focusing on the

[17] Section 114(1) of the Criminal Justice Act 2003 provides that 'in criminal proceedings a statement not made in oral evidence in the proceedings can be admissible as evidence of any matter stated' only under certain circumstances, e.g. where 'all parties to the proceedings agree to it being admissible' (s. 114(1)(c). In principle, therefore, hearsay evidence is inadmissible in criminal proceedings unless one of the conditions specified under section 114(1) is met.

[18] For more on the deterrent effect of the criminal law see Halliday, French and Goodwin (2001).

[19] See 4.1.1.

second criminal limb of the ASBO, Alvaro Gil-Robles (2004) contended the ASBO could potentially lead to the creation of 'personalised penal codes, where non-criminal behaviour becomes criminal for individuals who have incurred the wrath of the community'. This is of course in stark contrast with the very foundations of a contemporary liberal society where respect for individual autonomy is of paramount significance (Locke, 1980). As Mill (2002) rightly pointed out, individuals should not only be protected from the will of the state, but they must also be protected from the will of the majority.

Despite a general focus on the second criminal limb of the ASBO, the first 'civil' limb has also attracted criticism. As Duff and Marshall (2006) point out, the restrictions imposed when the order (which was civil in nature) was issued could be so severe that they could constitute a form of punishment in their own right. On this view, it was possible for the first limb of this two-part process to constitute a form of *indirect* criminalisation. Indirect criminalisation refers to the process of criminalising certain kinds of behaviour through legislation which is classified by the legislature as non-criminal. In contrast, *direct* criminalisation refers to the criminalisation of certain kinds of behaviour through legislation which is formally labelled as criminal.

Allowing the state to criminalise behaviour indirectly through non-criminal legislation is morally problematic since, in theory, it is possible for law enforcement agents to expand (even unwittingly) the reach of the criminal law into areas that had been concluded by the legislature as not appropriate for criminalisation. This becomes more problematic in light of the fact that those subjected to indirect criminalisation are denied, at least to some extent, all of those enhanced procedural protections afforded to those subjected to direct criminalisation. It is essential, therefore, for criminal law theorists to formulate mechanisms through which instances of indirect criminalisation can be identified and prevented.

Apart from the criminalisation of unregulated conduct and/or conduct that falls within the ambit of everyday human interaction, concerns were also expressed about the possibility of using the ASBO against behaviour which was already proscribed by the criminal law. Duff (2007: 13), for instance, characterised the ASBO as a 'pseudo-non-criminal' measure, since it could be used as an alternative to criminal prosecution in order to address behaviour which should have been dealt with by the criminal law. Ashworth

and Zedner (2010) contend that when non-criminal mechanisms of social control are utilised to address behaviour that already falls within the ambit of the criminal law, then this constitutes a form of *under-criminalisation*. What is problematic about under-criminalisation is that it undermines the normative distinction between criminal and non-criminal legislation.[20]

Evidence from a study conducted by Koffman (2006: 601) suggests that on a number of occasions the ASBO was used as a means of addressing 'relatively serious forms of misconduct and offending'.[21] For Koffman (2006), this was attributed to the fact that drawing a precise distinction between behaviour which is purely anti-social and behaviour which is criminal in nature is not always possible. This was also acknowledged by the Home Office (2011b) which notes that ASB includes behaviour which is already proscribed by the criminal law, such as criminal damage.

The use of the ASBO against certain kinds of behaviour which were already proscribed by criminal law, is also evident through a line of cases examined by the Court of Appeal, such as in *R v Curtis Braxton [2004] EWCA Crim 1374* and *R v Tripp [2005] EWCA Crim 2253*, through which it was acknowledged that it was possible for a sentencing court to impose a restriction on the perpetrator which, in effect, would duplicate certain criminal offences. In *Curtis Braxton*, for instance, an ASBO was issued against an individual prohibiting him from 'using threatening, abusive or similar behaviour towards any person or property in a city centre' (167) (see, for example, the section 4 offence of the Public Order Act 1984). Similarly, in *Tripp*, the perpetrator was prohibited from 'using threatening, abusive or insulting words or behaviour or disorderly behaviour within the hearing or sight of a person' (para. 2). What is important about these prohibitions was that on many occasions the maximum sentence for breach of an ASBO was significantly higher than the maximum sentence for the criminal offence in question (Ashworth & Horder, 2013). Although, for instance, those found guilty of the section 4 offence face a custodial sentence of six months, those found in breach of their ASBOs faced a five-year custodial sentence and a fine. In theory, therefore, the ASBO could be used as a means of increasing the maximum sentence available for certain low-level offences. As held by the Court of Appeal in *R v Boness [2005] EWCA Crim 2395*, however, courts 'should be reluctant to impose an order which prohibits an offender from,

[20] See 2.1.
[21] This finding was reaffirmed by a latter study conducted by Crawford, Lewis and Traynor (2016).

or merely from, committing a specified criminal offence' since the purpose of the ASBO was to prevent ASB rather than to deal with criminal offences (para. 35).

The second major statutory instrument introduced to address ASB as a specific concept was the CrASBO. In contrast to the ASBO, the CrASBO was an order which could *only* be imposed on those who were found guilty of an offence and behaved in an anti-social manner.[22] Notwithstanding the sentence received for the offence committed, if the criminal court in question was convinced that some additional steps were *necessary* to prevent the perpetrator from engaging in further ASB in the future, then a CrASBO could be issued.[23] The issue of a CrASBO was an addition to the sentence received for the commission of the triggering offence.[24] Similar to the ASBO, breach of a CrASBO without any reasonable excuse constituted a criminal offence.[25]

At first sight, the CrASBO appears to be less contentious than the ASBO since it could only be issued against those who had already been convicted of an offence, i.e. individuals that had already gone into the realm of criminality. Similar to the ASBO, however, a number of concerns could be raised regarding the procedure followed for the issue of a CrASBO. Despite the fact that the CrASBO could only be imposed by a criminal court after the perpetrator was found guilty of an offence and that the prosecution had to prove beyond any reasonable doubt that the offender behaved in an anti-social manner, it was evident that not all enhanced procedural protections were afforded to those against whom such an order was issued. Section 3B of the 1998 Act, for instance, explicitly stated that it was possible for the prosecution and/or the defence to submit evidence which might not 'have been admissible in the proceedings in which the offender was convicted', e.g. hearsay evidence.

What was also morally problematic about the CrASBO was the fact that there was no need for the offence that triggered the issue of the order to be associated with the ASB in question. In theory, it was possible for the triggering offence to be completely unrelated to the offender's ASB. It was sufficient for the perpetrator to have been convicted of at

[22] Section 1C(1).
[23] Section 1C(2)(b).
[24] Section 1(4).
[25] Section 1C(9).

least one relevant offence, i.e. any offence that was committed after section 64 of the 2002 Act came into force.[26]

The current law on anti-social behaviour

The ASBO has now been repealed by a new civil injunction (injunction) under Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014 (2014 Act).[27] Part 1 of the 2014 Act consolidated a number of orders and injunctions, such as the ASBO, the ASBI and the football banning order, into a single multi-purpose injunction (House of Commons, 2013).

Although the two-step regulation model adopted by the ASBO was retained, the injunction is a purely civil mechanism.[28] Similar to the ASBO, proceedings for the issue of an injunction are civil in nature and thus the civil procedural rules apply. In contrast to the ASBO, however, breach of the injunction does not constitute an offence (Home Office, 2014). Rather, it constitutes a 'contempt of court' and carries a maximum sentence of two years imprisonment and an unlimited fine (Home Office, 2014). Although breach of the injunction no longer constitutes an offence, the applicable standard of proof for breach proceedings is the criminal rather than the civil one (Home Office, 2014). This is attributed to 'the potential severity of the penalties which the court can impose on respondents' (Home Office, 2014: 26). Nonetheless, it should be borne in mind that breach of the injunction can still result in the imposition of a custodial sentence.

The CrASBO has been repealed under Part 2 of the 2014 Act by the criminal behaviour order (CBO). Although the CBO retains most of the CrASBO's key features, it is worth examining some of the most important changes brought in by the 2014 Act. First, in order for a CBO to be issued the prosecution must prove beyond any reasonable doubt that the offender has acted in an anti-social manner.[29] In contrast to this, in order for a CrASBO to have been issued, the relevant court needed only to 'consider that the offender has acted' in an anti-social manner'.[30] It should be noted, however, that in the proceedings for the issue of a CBO it is still possible for both the prosecution and the

[26] Section 1C(10).
[27] A transitional period of five years was put into place for ASBOs issued before Part 1 came into force. Those ASBOs which were issued prior to the 2014 Act and last for more than five years by the end of this transitional period will automatically be transformed into Part 1 injunctions (House of Commons, 2013).
[28] See 4.1.2.
[29] Section 22(3).
[30] Section 1C(2)(a) of the 1998 Act.

defence to submit evidence which might not have been admissible during the criminal proceedings that led to the perpetrator's conviction.[31] For instance, it is possible for the prosecution to submit hearsay and/or bad character evidence in order to prove that the offender behaved in an anti-social manner. In principle though, hearsay evidence cannot be admitted in criminal proceedings.

Secondly, a CrASBO could only be used if the court examining the application was satisfied that this was a necessary means to protect members of the public from further ASB.[32] In order for a CBO to be issued the criminal court in question must be satisfied that this 'order will help in preventing the offender from engaging' in further ASB.[33] The 2014 Act, therefore, appears to lower the required threshold that must be met in order for a post-conviction order of this kind to be issued.

Conceptualising anti-social behaviour under the current law

According to the Home Office (2011b: 8), ASB 'cover[s] a broad range of crime, disorder and nuisance'. Simply put, ASB can range from mere incivilities, such as noisy neighbours, which can be regarded as part of everyday human interaction to behaviour which is already proscribed by criminal law, such as criminal damage (Home Office, 2012). At first sight, certain kinds of ASB, especially those situated at the lower end of the spectrum, can be dismissed as too trivial to warrant any kind of formal legal intervention (Cornford, 2012). What really matters about ASB though, it is often the cumulative impact of someone's behaviour on others rather than the seriousness of each isolated incident. It was this need to protect the public from persistent low-level criminality that provided the impetus for the introduction of the initial ASB legal framework back in the late 1990s (Macdonald, 2006b). As the tragic case of Fiona Pilkington and of her two children revealed, the cumulative impact of ASB can indeed be devastating (Koffman, 2006). Following prolonged ASB directed at her family, this eventually led her to set fire to her car killing herself as well as one of her children (The Guardian, 2012).[34]

[31] Section 23(2) of the 2014 Act.
[32] Section 1C(2)(b) of the 1998 Act.
[33] Section 22(3) of the 2014 Act.
[34] Although Fiona Pilkington complained on numerous occasions to the police about the prolonged harassment she and her family experienced, the relevant police force failed to classify them as a vulnerable family. Moreover, despite the numerous complaints received, the Leicestershire Police failed to consider Pilkington's neighbourhood as an 'anti-social behaviour "hot spot" and … it was never targeted for a more proactive police response' (Independent Police Complaints Commission, 2009: para. 1212).

Another important characteristic of ASB is that it cannot only vary in terms of its severity, but it can also vary in terms of its nature. As noted in 2012, by then Home Secretary Theresa May, ASB is primarily a local problem which can take various forms and vary considerably amongst areas (Home Office, 2012). What can be perceived as anti-social in one part of the country, might go unnoticed in another (Home Office, 2012). On this view, local enforcement agents should be granted a certain degree of discretion needed in order to be able to address what really matters to their local communities (Home Office, 2012). To achieve this, a flexible legal framework is required which will enable local enforcement agents to address those kinds of behaviour that have a negative impact on their communities (Home Office, 2011b).

This need for a flexible legal framework which will take into consideration both of the abovementioned characteristics provided the basis for the current statutory definition of ASB under section 2 of the 2014 Act. Section 2, draws a distinction between two types of ASB, housing and non-housing related. The former refers to behaviour which is 'capable of causing nuisance or annoyance' and takes place in a housing related context.[35] The latter refers to behaviour which 'caused, or is likely to cause, harassment, alarm or distress to any person' regardless of where this behaviour takes place.[36] It is worth noting that under the 2014 Act, hate incidents are also regarded for the first time as a form of ASB (Duggan & Heap, 2014). [37]

From a victim's perspective,[38] the broad drafting of the statutory definition provides the necessary flexibility required to law enforcement agents to effectively address a number of longstanding problems which could not have been adequately addressed otherwise. The ambiguous nature and the unrestrained ambit of the statutory definition, however, which has not been narrowed within the 2014 Act, was severely criticised by a number of legal commentators. Cornford (2012), for example, contends that the statutory definition of ASB can potentially include behaviour which is well beyond what we commonly regard as anti-social. Numerous cases emerged where the ambit of the statutory definition was extended to rather bizarre situations raising concerns

[35] Section 2(1)(c) and (b).
[36] Section 2(1)(a).
[37] A hate incident is any kind of behaviour that does not constitute a criminal offence, but it 'is perceived, by the victim or any other person, to be motivated by a hostility or prejudice' based on someone's actual or perceived race, religion, sexual orientation or disability (College of Policing, 2014: 4).
[38] In a number of Home Office reports and in the Statutory Guidance for the 2014 Act those affected by this kind behaviour are referred to as 'victims' of ASB (Home Office, 2012; House of Commons, 2013).

regarding the implementation of the relevant statutory provisions (Sankey, 2011). One of the most illustrative examples is the case of Alexander Muat whose tendency to make sarcastic comments to his neighbours was deemed as anti-social (BBC New, 2003).

Examples such as the above can be attributed to the fact that the statutory definition of ASB places particular emphasis upon the impact or the *likely* impact of the perpetrator's behaviour on other people rather than focusing on the actual nature of the behaviour in question. This means that victims, local enforcement agents and the courts play a crucial role in terms of how ASB is conceptualised in practice. It is for this reason that ASB must be interpreted with caution, since if left unrestrained it can lead to situations where personal eccentricities, such as making sarcastic remarks, can be regarded as anti-social simply because someone's behaviour diverges from what is perceived as normal or goes beyond what is tolerated by others within any given neighbourhood or community (Ramsay, 2004).

**Research objectives**

The hybrid nature of the ASBO has sparked fierce criticism. For many of its critics, such as Ashworth (2004), the criminal nature of the ASBO's second limb enabled the *de facto* criminalisation of a wide range of activities without the need to resort to *direct* criminalisation. To illustrate this, consider the following hypothetical. Suppose that Andrew used to feed seagulls in the town centre. This caused many problems to nearby businesses and local residents. The police deemed Andrew's behaviour as anti-social and decided to apply for the issue of an ASBO against him through which he would be prohibited from feeding seagulls in the town centre. Although Andrew's behaviour at the time was not proscribed by the criminal law, the fact that breach of the order constituted a criminal offence meant that the feeding of seagulls was in effect criminalised.[39] Seen in this way, the move to a purely civil injunction under the 2014 Act appears on face value to be a positive development, since it seemingly addresses any concerns raised regarding the order's hybrid nature. [40] It should be borne in mind though that breach of the new civil injunction can still result in the imposition of a lengthy custodial sentence (Home Office, 2014).

[39] Ramsay (2012) maintains that what was in fact criminalised through this 'two-step' regulation process was the failure of the offender to reassure society that he does not pose any threat to their security.
[40] Hoffman and MacDonald (2010) were amongst the first to propose the repeal and replacement of the ASBO with a purely civil injunction.

Concerns have also been raised about the ASBO's first limb. Despite the 2014 amendments and the shift towards a purely civil injunction, these criticisms remain largely unaddressed. The unrestrained ambit of ASB's statutory definition, for instance, still enables local enforcement agents to deal with behaviour which appears to be part of everyday social interaction. Most importantly, severe restrictions can still be imposed on someone's liberty through the first limb of the current two-step regulatory process.[41] These restrictions might be so severe that they can constitute a form of criminal punishment in their own right regardless of the potential consequences that breach of the injunction might bring about. [42] In principle, therefore, the issue of an injunction (the first limb of this regulatory process) can result in the indirect criminalisation of certain kinds of behaviour.

Apart from the moral challenges posed by indirect criminalisation discussed earlier, the criminalisation of certain kinds of behaviour through an injunction's first limb raises a number of additional questions regarding its potential implementation. The potential criminal nature of the restrictions imposed through the first limb of the injunction in conjunction with the ASB's broad statutory definition can result in the creation of localised criminal codes. To illustrate how localised criminal codes can be created through the implementation of the injunction, let us revisit the foregoing hypothetical. Suppose that the restrictions imposed on Andrew (for feeding seagulls) constitute a form of criminal punishment in their own right regardless of whether he breaches the injunction issued against him.[43] In this case, Andrew is not only punished in the absence of the enhanced procedural safeguards, but the injunction (along with how ASB is currently defined) enables local enforcement agents to criminalise indirectly what they regard as anti-social leading to the creation of localised criminal codes.

The foregoing hypothesis becomes more concerning since through the 2014 amendments the proximity of the injunction to the criminal law has been officially distanced. This means that the implementation of the injunction might attract less

[41] As discussed in more detail in 4.1.2, the first limb of the injunction and of the CBO are potentially even more restrictive than the first limb of the ASBO and of the CrASBO due to the fact that under the 2014 Act positive obligations can be imposed as well, i.e. the perpetrator can be ordered to do something.
[42] I justify further why it is worth examining whether the implementation of the injunction constitutes a form of criminalisation in 4.2.2.
[43] I will define what amounts to criminal punishment in 3.2.

attention and scrutiny, enabling local enforcement agents to use this tool as a means of criminalising indirectly what they consider to be ASB.

The main research objective of this thesis is to test the validity of the abovementioned hypothesis by scrutinising the implementation of the injunction's first limb. Before testing the validity of this hypothesis, it is essential to elaborate on the difference between criminalisation and every other method of social regulation in order to demonstrate why the classification of the injunction as criminal or non-criminal is so important. The next step is to identify the circumstances under which a particular kind of behaviour is criminalised regardless of the label attached to the relevant legal rule. Central to this thesis, therefore, are the following research questions:

1) Why is it important to distinguish criminal law from other forms of social regulation?
2) How can we identify when conduct has been criminalised (either directly or indirectly)?
3) Have law enforcement agents created their own localised criminal codes through the implementation of the injunction's first limb?

To address these three research questions, it is necessary to combine several different methodologies. Initially, a doctrinal research design is needed through which the validity of the original hypothesis can be tested. For instance, attention should be paid on how the law appears on the statute book and how this has been interpreted and applied by courts.[44] Second, in order to understand why it is important to distinguish between criminal and civil rules, it is imperative to engage with legal theory and questions of legitimate questions of criminalisation (i.e. normative theories of criminalisation). Third, in order to investigate whether the injunction has been implemented in a manner that resulted in the indirect criminalisation of certain kinds of ASB, it is necessary to analyse existing tests for distinguishing criminal and civil rules. The close analysis of these pre-existing accounts can result in the formulation of a single viable test through which we can assess more accurately the status of the law based on how this is applied by law enforcement agents. To this end, the theoretical analysis of the law on ASB is complemented by a socio-legal analysis that is based on by the findings from an empirical study as part of which twenty-nine semi-structured interviews with local enforcement agents from two

[44] See 1.1.

areas in England have been conducted.[45] The main objective of these interviews has been to scrutinise the implementation of the injunction's first limb and explore whether this has resulted in the indirect criminalisation of certain kinds of behaviour. It should be noted, however, that although the main focus of this thesis is the injunction's first limb, reference will be made to the CBO's first limb as well as any other informal interventions used by local enforcement agents, such as Acceptable Behaviour Contracts (ABC), to address ASB.[46]

The main reason for making reference to both the CBO and any informal interventions used at a local level is twofold. First, as far as the CBO is concerned, its first limb allows for the imposition of restrictions and obligations similar to the ones that can be imposed through the injunction's first limb. Hence, it is possible for the CBO's first limb to constitute a form of criminalisation in its own right. Secondly, as previous research has shown, local enforcement agents sought to address ASB through a number of informal interventions, such as ABCs, before applying for the issue of an ASBO (Squires & Stephen, 2005b; Lewis, Crawford, & Traynor, 2016). Through these informal interventions certain restrictions were imposed on those whose behaviour was regarded as anti-social. It is necessary, therefore, to further explore the use of these two measures in order to examine whether similar normative challenges to those discussed earlier about the injunction arise.

**Thesis structure**

Chapter 1 presents the methodology adopted to address the research questions of this thesis. The chapter begins by elaborating on how the notion of localised criminal codes through the implementation of ASB tools and powers has emerged. The chapter then proceeds to discuss the methodology used to address each research question. Central to this chapter is the empirical study conducted with local enforcement agents in two counties in England regarding the implementation of the ASB measures. The chapter not only focuses on the sampling and data analysis techniques used, but it also highlights some of the technical and ethical challenges faced during this study.

[45] I elaborate further on the methodology adopted to address each question in chapter 1.

[46] For the purposes of this thesis, when reference is made to the 'ASB tools and powers' and/or 'ASB measures', then this should be taken as a reference to the injunction, the CBO and any informal intervention used by local enforcement agents.

The purpose of chapter 2 is twofold. First, it aims to identify what distinguishes criminal law from other methods of social control. The aim of this analysis is to highlight criminal law's unique moral status and demonstrate the importance of a clear distinction between criminalisation and other forms of regulation (the first research question). The chapter demonstrates what is problematic about indirect criminalisation and why the moral distinction between the criminal law and other forms of regulation must be preserved.

Secondly, it engages with some of the most prominent (and relevant to the purposes of this thesis) theories of criminal law and punishment. It also examines some of the most important principles underpinning criminalisation and punishment, such as the principle against retroactive criminalisation. The close examination of these normative accounts highlights further the need to distinguish criminal and non-criminal rules, since for most legal philosophers criminalisation should be used only under certain circumstances and punishment should only be imposed in order to achieve certain results. The close analysis of these theories and principles also equips us with the necessary analytical tools and philosophical background required to assess the legitimacy of criminal rules. For instance, if there is evidence to suggest that the implementation of the injunction's first limb resulted in the indirect criminalisation of certain kinds of behaviour, it is then necessary to evaluate this measure in the same way as we would have evaluated a criminal offence.

Chapter 3 proceeds to formulate a working definition of criminalisation. This working definition identifies and elaborates on the circumstances under which the implementation of a legal rule constitutes a form of criminalisation (the second research question of the thesis). Central to this working definition is the need to look beyond the official classification of legal rules and investigate if they are operating as *de facto* criminal measures.

Chapter 4 moves to examine in more detail the current legislative framework on ASB and how the law on this area has changed following the 2014 amendments. The purpose of this analysis is twofold. First, it is to provide a more detailed account of the relevant statutory provisions and lay the foundations for the theoretical evaluation of the ASB legal framework. Secondly, this analysis aims to illustrate that despite the 2014 amendments through which the ASBO was repealed and replaced by a civil injunction it

is still necessary to investigate how the injunction has been used in practice. This is attributed to the first limb of the injunction and of the CBO. The chapter then examines more closely the injunction with reference to the working definition of criminalisation formulated in chapter 3. The purpose of this assessment is to investigate if, in theory, the implementation of the injunction could lead to the indirect criminalisation of certain kinds of behaviour.

Chapter 5 presents the findings of the empirical research conducted with local practitioners and police officers in two counties in England. It is worth mentioning that this was the first empirical data (that I am aware of) collected regarding the 2014 amendments and their implementation at a local level.[47] The main objective of the empirical study was to examine whether the implementation of the ASB tools and powers (primarily of the injunction's first limb) resulted in the creation of localised criminal codes in the sites in question.

Notwithstanding, the concerns raised about the potential misuse of the relevant tools and powers, evidence from this study suggest that the implementation of these measures rarely resulted in the indirect criminalisation of certain kinds of behaviour based on how criminalisation was defined in chapter 3. Instead, it was evident through the data collected from both sites that these measures were used in a sensible manner focusing only on behaviour that really had an impact on other people's lives. The chapter also sheds light on how ASB was conceptualised at a local level and how incidents of ASB were managed. It was evident from the data collected, for instance, that the management of cases was primarily risk driven, i.e. based on the perceived level of risk faced by those being subjected to ASB. This study also found that a social-care driven approach was adopted by local enforcement agents who paid particular attention on how the underlying causes of ASB can best be addressed. The findings of the empirical study, therefore, not only shed light on the impact of the 2014 amendments on the daily administration of ASB at a local level, but they also challenge a number of preconceptions regarding the potential implementation of the measures in question.

Chapter 6 reflects further on the most important findings of the empirical study focusing primarily on how the indirect criminalisation of certain kinds of ASB can be prevented in the future. Although, the implementation of the ASB tools and powers has

[47] For more on the contribution of this empirical study to the current academic literature see 5.1.

rarely resulted in the indirect criminalisation of certain kinds of behaviour, it is still necessary to identify and scrutinise some possible reform options. To this end, particular emphasis is placed on those instances where the implementation of the ASB measures did not result in the imposition of criminal punishment. This chapter concludes by elaborating on how the findings of this study affect our broader theoretical understanding of criminalisation and ASB. Central to this analysis, is the implications of these findings on the debates on over and under-criminalisation.

The conclusion reflects back on the impetus for initiating this thesis and why it is imperative to be mindful of indirect criminalisation. It also draws on the most important findings of the empirical study, their broader philosophical implications and the contribution of this thesis to the academic literature on criminalisation and ASB. This thesis concludes by reflecting on its main research question and the need for additional measures to be put in place in order to prevent the implementation of the ASB tools and powers in a manner that results in the indirect criminalisation of certain kinds of behaviour.

# Chapter 1: Methodology

Investigating the presence of localised criminal codes has required me to critically engage with important questions within legal theory. Central to this investigation was the need to formulate mechanisms for distinguishing criminal from non-criminal rules.[1] It has also required me to scrutinise various research designs through which the primary (third) research question of this thesis could be best addressed. Upon closer scrutiny of the various research designs that could have been adopted, a decision was taken to conduct an empirical study using semi-structured interviews with local enforcement agents. This enabled me to complement the philosophical analysis of the relevant statutory provisions with empirical evidence regarding the implementation of the injunction's first limb at a local level. A purely theoretical analysis of the relevant legislation can only expose the potential for indirect criminalisation. An empirical study can assist in examining whether in fact the implementation of the injunction's first limb has resulted in the indirect criminalisation of certain kinds of ASB.

This chapter begins by elaborating on how initial observations and assumptions about the implementation of the injunction led to the notion of localised criminal codes, which provided the impetus for this thesis. The second part of this chapter focuses on the method used to identify those characteristics of the criminal law that distinguish it from other forms of social regulation. The next part of this chapter discusses the work done in relation to the identification of those conditions that must be met in order for a particular rule to be regarded as criminal. The chapter concludes by elaborating on the empirical study conducted through which the potential for creating localised criminal codes (through the implementation of the injunction's first limb) was examined. Particular emphasis is placed here on the data collection technique used, the sampling methodology adopted, the design of the interview schedules and what methods of coding and analysis were employed.

## 1.1 Laying the foundations

This thesis has been premised on the hypothesis that if local enforcement agents have been able to criminalise indirectly what they regard as anti-social through the use of the

[1] See 3.2.

injunction's first limb, then they would have created their own localised criminal codes. Before finalising the research objectives of this thesis and deciding which the most appropriate methodology was to test the validity of the above hypothesis, I had to critically engage with the existing theoretical and empirical literature on ASB and criminalisation (Hutchinson & Duncan, 2012). The purpose of this was to 'reconsider and refine [my initial hypothesis and] begin to examine possible [research] designs' (Berg & Lune, 2014: 25).

The analysis of the literature began by focusing on the concerns raised by legal commentators on the scope of the injunction's first limb (as well as of the ASBO's first limb) and how the discretion granted to local enforcement agents can be misused and potentially result in the *indirect* criminalisation of ASB. In order to test the validity of my initial hypothesis further, I decided to critically engage with the relevant statutory provisions (both the 1998 and the 2014 Act), case law and other authoritative texts, such as Explanatory Notes (McCrudden, 2006). As Hutchinson and Duncan (2012: 113) maintain, doctrinal research (i.e. reading and analysing primary sources, such as pieces of legislation) enables researchers to 'establish the nature and parameters of the law' in question.

The doctrinal research began by focusing on how ASB was defined under the 1998 Act. After a close examination of section 1(1)(a) of the 1998 Act, it was evident that the law imposed no limits as to the kinds of behaviour that could be regarded as anti-social. It appeared possible, therefore, for the law to be used against a wide spectrum of behaviour ranging from mere 'incivilities' to conduct which is already proscribed by criminal law.[2] This was further evidenced by the fact that there was no need for the perpetrator's behaviour to actually cause 'harassment, alarm or distress'. This was followed by a close analysis of section 1(6) of the 1998 Act which referred to the restrictions that could be imposed on those against whom an ASBO was issued. Similar to the definition of ASB, the broad drafting of section 1(6) meant that it was possible for the court examining the application for the issue of an ASBO (first limb of the ASBO) to impose restrictions that could severely restrict the perpetrator's liberty. This conclusion was further supported through my analysis of a number of cases which revealed that the

[2] See 'Conceptualising anti-social behaviour under the current law'.

restriction imposed on those against whom an ASBO was issued included amongst others home curfews and non-association clauses (Hutchinson & Duncan, 2012).

The doctrinal research conducted, provided me with an enhanced understanding of the nature and scope of the law on ASB (Hutchinson & Duncan, 2012). Most importantly, though, after 'reading, analysing and linking' the conclusions drawn from the doctrinal research and upon further reflection on the existing literature on ASB and criminalisation, it was evident that the initial hypothesis made regarding the possibility of creating localised criminal codes through the implementation of the injunction's first limb was reasoned (Hutchinson, 2010: 37). This led me to engage with central questions within legal theory and to formulate the research objectives of this thesis, e.g. 'what is it to criminalise?'. To reiterate them here, this thesis addresses the following research questions:

1) Why is it important to distinguish criminal law from other forms of social regulation?
2) How can we identify when conduct has been criminalised (directly or indirectly)?
3) Have law enforcement agents created their own localised criminal codes through the implementation of the law relating to ASB?

The methodology adopted for each research question was largely determined by its merits and how it could be best addressed (Wilson & Sapsford, 2006).

### 1.2 A theoretical analysis of criminal law's distinctiveness

In order to illustrate why the classification of the injunction as criminal or non-criminal matters, it was essential to focus on criminal law's distinctiveness and why this should be maintained. This was achieved by scrutinising the rich academic literature on the moral distinction between the criminal law and other forms of social control used by the state. The close analysis of the academic literature enabled me to identify those characteristics which are unique and that distinguish the criminal from the civil law. This close philosophical analysis also highlighted what is problematic about indirect criminalisation.[3]

[3] See 2.1.

### 1.3 Identifying criminal rules: Focusing on doctrines

Examining whether the implementation of a particular legal rule has resulted in the indirect criminalisation of certain kinds of behaviour, presupposes a clear understanding of what it is to criminalise, i.e. a set of conditions which must be met in order for any legal rule to be regarded as criminal. To achieve this, doctrinal research was conducted in order to examine how courts have maintained the distinction between criminal and non-criminal rules in their identification and application of legal rules. The objective of this analysis has been to scrutinise the leading authorities in this area in search for a viable and robust test within the current literature. Ultimately, this search led to a slightly adapted approach which is better suited to address the main research question of this thesis.

The doctrinal research has focused primarily on the decisions of the ECtHR in *Engel* and of the House of Lords in *McCann* which explicitly dealt with legal rules that were susceptible to indirect criminalisation.[4] In *Engel*, the ECtHR formulated the anti-subversion doctrine through which it examined whether certain administrative rules should have been dealt with as criminal (para. 72). In *McCann*, the House of Lords relied on the ECtHR's decision in *Engel* to assess whether the ASBO should have been regarded as a criminal order, albeit being labelled as civil by the legislature. The close analysis of these cases laid the foundations for formulating a working definition of criminalisation which has been later utilised to assess whether localised criminal codes have been created through the implementation of the injunction's first limb.

### 1.4 Creating localised criminal codes? The empirical study

Doctrinal research provides researchers with 'an insider's view of the law' (Hutchinson, 2013: 15). It enables them to identify legal rules which are applicable to a given scenario and 'not concerned with the effects of the law in the world' beyond the statute book (Hutchinson, 2013: 15). What is problematic about a purely doctrinal analysis, however, is that it fails to take into consideration how the law has been implemented in practice (Hutchinson, 2013). As McCrudden (2006) explains, there can be significant discrepancies between the way the law appears on the statute book and the way it is implemented by law enforcement agents. It was precisely for this reason that I decided to scrutinise the implementation of the injunction's first limb through an empirical study

[4] For a more comprehensive analysis of the ECtHR's decision in *Engel* and of the House of Lords' decision in *McCann* see 3.1.2 and 'The pre-2014 approach to anti-social behaviour' respectively.

which would allow me to examine the relevant legislation in its social rather than solely its theoretical context and investigate whether localised criminal codes had been created (McCrudden, 2006).

The move to conduct empirical research is not to underplay the importance of doctrinal research. As Ramsay (1996: 112) explains, a 'researcher needs to spend sufficient time in order to be reasonably on top of the subject before commencing the empirical research'. Rather, the above is to point out that the theoretical analysis of the law might not always accurately reflect how the law has been implemented in practice, especially in cases where the law in question has been broadly drafted providing a significant degree of discretion to law enforcement agents and the courts as to its implementation.

### 1.4.1 Data collection technique

Upon closer scrutiny of the various research designs that can be adopted, I decided that the most appropriate option for exploring whether localised criminal codes have been created would be a qualitative rather than a quantitative study (Silverman, 2013). A qualitative study enables researchers to determine the 'presence or absence' of a particular phenomenon whereas a quantitative design allows them to assess the 'degree to which some feature is present' (Kirk & Miller, 1985: 9). A mere examination of the number of injunctions issued, for instance, could not by itself reveal whether localised criminal codes have been created. Previous research has shown that local enforcement agents have tried to address ASB through a number of informal interventions, such warning letters and ABCs (Home Office, 2003). Although through these interventions certain restrictions can be imposed on the perpetrator's liberty, these do not appear on official statistics. Moreover, a quantitative examination would not reveal whether the restrictions imposed on the perpetrators constitute a form of criminalisation, since this would not reveal the nature of the restrictions imposed and whether these constitute a form of criminal punishment. Instead it would have only revealed the number of restrictions imposed.

It should also be born in mind that the implementation of the ASB measures can vary considerably from one area to another due to the wide drafting of the relevant legislation (Home Officer, 2011b). It was, therefore, imperative to study the implementation of these measures in detail in order to explore local enforcement agents' understanding of ASB, their practices in terms of applying for the issue of an injunction,

their reasoning and justifications for doing so, and the types of restrictions that were imposed on those against whom the injunction was issued (Patton, 2002).

The method of data collection used was semi-structured interviews. This method of data collection allowed the interviewees to elaborate on their own experiences and perceptions of ASB (Rubin & Rubin, 2012; Bazeley, 2013), whilst enabling me to 'develop a comprehensive picture' regarding the implementation of the relevant legislation in the sites under study (Bachman & Schutt, 2016: 273).[5]

1.4.2 Ethical clearance

Although empirical studies enable legal commentators to move away from a strictly theoretical analysis of the law in question, gaining access to research participants and information about the issues examined, these should not be achieved at the expense of research ethics (RESPECT, 2004). As Israel and Hay (2012: 501) explain, every empirical study needs to meet certain ethical standards in order to 'assure trust and help protect the rights of individuals' who participated in the study. Obtaining data in an ethical manner also maintains the integrity of the study (Hammersley & Traianou, 2012). It is for this reason that research institutions require researchers who plan to conduct an empirical research to apply for ethical clearance as a means to ensure that their research will adhere to certain ethical standards (Israel & Hay, 2012).[6]

Empirical researchers must not only 'meet the demands of the regulators of research ethics', but they also need to ensure that their research is, in fact, conducted in an ethical manner (Israel & Hay, 2012). Researchers, for instance, must make sure that 'the participants agree to research before it commences [and their] consent should be informed and voluntary' (Israel & Hay, 2012: 501). In order to make sure that potential interviewees were fully aware of the nature of this study and possible risks associated with it; both the consent form and accompanied information sheet for this study were sent to them in advance.[7] Both documents contained detailed information about the aims of this study and the process of data collection and management. Research participants were able to scrutinise both documents thoroughly and take an informed decision regarding

[5] For further details on the interview schedule see 1.4.5.
[6] Before commencing my empirical study I had to receive ethical clearance from the University of Sussex (Application No: ER/SD366/1). As part of my application, I had to explain the nature and purposes of my research and how I was planning to meet the ethical standards of the university.
[7] See Appendix A and Appendix B.

their participation in this study. Particular reference was made to the use of a voice recording device which enabled me to analyse the data obtained more accurately.[8] The use of this device also allowed me to concentrate fully on the interviewees' account and take additional notes when necessary (Bryman, 2016).

Another important ethical issue which had to be taken into consideration both prior and throughout this study related to the identity of the interviewees and the sites examined. Before contacting any institutions in order to gain access to their employees, a conscious decision was taken not to reveal the true identity of the interviewees, their institutions or the actual sites investigated. Instead, I decided to replace their true identities with reference codes and when necessary to alter the names of places and/or organisations (Bryman, 2016). As part of this process, a document matching participants' true identity with a reference code has been created.[9] Interview recordings and the document containing the participants' details have been stored on different external hard drives which are only accessible by me.

Before elaborating on the reasons why I decided to protect the participants' true identity, it is important to explain why site anonymity was required. As explained below, the population from which research participants were chosen was relatively small and that meant that if the names of the sites examined were revealed, then this could have easily led to the identification of the research participants.[10] To clarify this further, it is important to explain how crime and disorder (including ASB) is managed at a local level. Under sections 5-7 of the 1998 Act, Community Safety Partnerships (CSP) were established. Each CSP comprises of the local authority, the relevant police force, the fire and rescue authority and probation services.[11] For each council district there is a CSP and its aim is to formulate strategies through which crime and disorder is to be addressed.[12] According to data provided by the Home Office (2011a), there are approximately 9-10 CSPs per county. In Site A, police officers from 7 different CSPs participated in this study. If the true identity of this site (and thus of the police force) in question was revealed, then this most probably would have resulted in the identification of the research

[8] These recordings were securely stored in accordance with the Data Protection Act 1998.
[9] See 'Ethical challenges'.
[10] See 'Sampling technique'.
[11] Section 5(1) of the 1998 Act.
[12] Section 6(1).

participants. It was, therefore, necessary to retain site anonymity in order to prevent the identification of the research participants.

The underlying rationale for concealing/altering any information that could lead to the identification of the research participants was threefold. First, my primary objective was to protect interviewees from any kind of harm (Department for Business, Innovation and Skills and Government Office for Science, 2007). Despite the New Labour government's endeavours to promote the use of the ASB tools and powers (Squires, 2006), the ASBO and the way it was implemented have been severely criticised on a number of occasions (Squires & Stephen, 2005a). Revealing the true identity of research participants (especially if there is evidence to suggest that the implementation of the injunction's first limb has led to the creation of localised criminal codes), could result in their stigmatisation and possibly jeopardise their employment. Researchers should not only concern themselves with the immediate risks posed to interviewees as a result of their participation in the study in question, but they also need to be mindful of 'the consequences that may flow from' it in the future (Israel & Hay, 2012). Anonymity, therefore, was deemed necessary in order to allow research participants to elaborate on the implementation of the ASB measures by their organisations without fearing that this might jeopardise their interests (Bachman & Schutt, 2016).

Secondly, another important factor for concealing the participants' true identity related to the issues of accessibility and participation. Due to the criticisms discussed earlier regarding the implementation of the ASBO, it appeared possible for 'gatekeepers' to deny access to potential participants in order to protect them and their institutions from outside scrutiny and, in turn, public scrutiny. Similarly, even if access was obtained, I thought that potential participants might have not been eager to participate or elaborate extensively on the implementation of these measures if their true identity was to be revealed. As a study conducted by Chan (2012: 306-307) with police officers revealed, it is 'difficult for academic outsiders to penetrate a close-knit organisation, [such as the police], to examine its culture and work practices'. Confidentiality, therefore, was also used as a means of gaining access to institutions and facilitating higher participation.

Finally, another important reason for site and participant anonymity lied with the need to protect any other individual who might have been negatively affected by this

study. Particular emphasised has been placed on the need to protect the identity victims and of people against whom these measures have been used.

1.4.3 Sampling technique

A purposive sampling technique was used to identify potential research participants and sites. The overall objective of the sampling technique used was to identify and study 'information-rich case[s from which I could] learn a great deal about issues of central importance to the purpose of' this study (Patton, 2002: 230). This enabled me to collect a credible body of data regarding the implementation of the injunction and explore whether localised criminal codes have been created (Wilson & Sapsford, 2006). To achieve this, it was essential to interview people who had an everyday interaction with ASB and were responsible for the implementation of the relevant legislation.[13] Although interviewing call-takers, for instance, would have provided useful insight on how ASB has been defined at a local level, this would not have been sufficient to determine whether localised criminal codes have been created (Bryman, 2016). Consequently, I decided to focus on ASB officers within police forces, local authorities, housing associations, and other institutions (such as Business Crime Reduction Partnerships) which are either part or often work closely with CSPs.[14]

Each local council, for instance, has its own Community Safety Unit (CSU) which deals explicitly with the reduction of crime and disorder. The manager of each CSU is also a member of the local CSP. Similarly, housing associations have their own ASB teams. Although housing associations are not members of CSPs, they are able to apply for a Part 1 injunction and they often work closely with CSPs to address crime and ASB in their properties.[15] The decision to include non-CSP members in this study enabled me to add variety into my sample and examine the implementation of these measures from a number of different perspectives (Flick, 2007). This also allowed me 'to test [any possible] contrasting' views that might exist (Rubin & Rubin, 2012: 53).

Initially, it was my intention to interview forty-five local enforcement agents from three different counties in England. This number of interviews was deemed sufficient for

[13] For the purposes of this thesis, non-police officers are referred to as local practitioners. All research participants are collectively referred to as local enforcement agents.
[14] Under section 5(2) of the 1998 Act, CSPs can co-operate with a number of other institutions and organisations if this is deemed necessary for the reduction of crime and disorder.
[15] Prior to the 2014 Act, housing providers, such as housing associations, could apply for the issue of an ASBI. See 'The pre-2014 approach to anti-social behaviour'.

'constructing a corpus of empirical examples [which would allowed me to study the implementation of ASB measures in the] most constructive way' (Flick, 2007: 27). After obtaining ethical clearance from the University of Sussex to conduct my empirical research, a list with the possible sites and institutions in which the 'target population [was] likely to be available' was drafted (Berg & Lune, 2014: 47).

The initial selection of possible locations was based on two criteria. The first and most important criterion related to what Patton (2012: 234-235) describes as the 'maximum variation (heterogeneity) sampling'. For Patton (2012: 234-235), the underlying objective of this method of purposive sampling is to 'capture and describe the central themes that cut across a great deal of variation'. This, according to him, can result in the identification of 'common patterns that emerge from great variation [which] are of particular interest and value in capturing the core experiences and central, shared dimensions of a setting or phenomenon' (Patton, 2012: 235). The importance of these common patterns lies with the fact that they 'emerge out of great variation' (Patton, 2012: 235). To achieve variegation, it was necessary to study one site which experienced high levels of ASB when compared to other sites, one which experienced moderate levels of ASB, and one situated at the lower end of the spectrum.

The process of identifying potential locations was based on the findings from the Crime Survey for England and Wales with regard to 'the percentage of adults aged 16 and over who have witnessed/experienced anti-social behaviour by police force area, in the year ending December 2013' (Office for National Statistics, 2014). Although, the figures provided were estimates, they were indicative of the level of ASB experienced and/or witnessed in these areas.

At this point it is important to explain why this selection process was not based on the actual number of ASBOs and CrASBOs issued per police force area.[16] At first sight, it could be argued that the number of orders issued in each county would be a strong indication of how punitive the implementation of ASB measures was in each area (Home Office & Ministry of Justice, 2014a). On this view, it would be reasonable to conclude that in areas where the ratio of orders issued to the area's population was above the national average, local enforcement agents most probably adopted a more punitive

[16] At that point there were no available statistics about the new tools and powers since Part 1 of the 2014 Act came into force in March 2015.

approach towards ASB. It is common practice, however, for local enforcement agents to use a number of informal interventions through which they try to address the perpetrator's behaviour before applying to court for an injunction or a CBO (Home Office, 2009). It was possible, therefore, for an area to have a relatively low ratio of orders to population, but in reality, having individuals punished through the use of informal interventions. This might have been particularly prevalent in areas with a high level of ASB, where local enforcement agents might have found it more convenient (maybe due to lack of resources) to deal with perpetrators through informal interventions. As a study conducted by Squires and Stephen (2005b) revealed, for instance, individuals who signed ABCs (and their families when young people were involved) were threatened with eviction from their property if they were found in breach of their contract. Based on the findings of that study, on many occasions perpetrators and their families 'felt they had been offered no choice but to sign the contract which contained terms already decided upon' (Squires & Stephen, 2005b: 132-133). The potential punitive nature of these informal interventions was the main reason why this study moved beyond the injunction and the CBO.[17]

The second criterion related to the resources available for this study. Due to the limited amount of resources and my desire to conduct face-to-face interviews, I had to choose sites which were in close proximity and easily accessible (Rubin & Rubin, 2012; Denscombe, 2014). The main reason for choosing face-to-face interviews lays with the need to build rapport with the interviewees and possibly gain access to more institutions (snowball sampling) (Bachman & Schutt, 2016). Although as Chan's (2012) study revealed, building rapport at an operational level can be challenging due to police culture, this endeavour to build rapport was necessary due to the relatively small number of the target population. In fact, most of the participants who preferred a face-to-face interview were happy to identify and provide me with the contact details of other potential participants who met the abovementioned criteria.[18]

Upon closer scrutiny of the abovementioned statistics and bearing in mind the above practical considerations, three possible sites were identified: (i) Site A; (ii) Site B; and (iii) Site C. Before elaborating further on the characteristics of each site it has to be noted that according to the above statistics, across England and Wales on average 26.78

[17] See 'Research objectives'.
[18] Only three out of the twenty-nine interviewees preferred telephone rather than face-to-face interviews as this was more convenient for them.

per cent of people aged 16 and above experienced and/or witnessed some kind of ASB between December 2012 and December 2013. Site A was chosen because the percentage of adults experienced and/or witnessed ASB was significantly higher than the average national. In contrast to Site A, Site B was very close to the national average. As far as Site C is concerned, this area was situated in the middle between Site A and Site B in terms of the percentage of adults who experienced ASB during the relevant period.

1.4.4 Negotiating access

In April 2015, a few weeks after Part 1 of the 2014 Act came into force, I approached various institutions from all three sites requesting permission to contact and possibly interview some of their employees who fulfilled the abovementioned criteria and were willing to participate in this study. Two institutions from Site A were the first to respond to my requests. As part of the negotiations to gain access to potential interviewees I was asked by these institutions to give two presentations to the relevant 'gatekeepers' through which I had to elaborate on the nature and objectives of this study. After these presentations, both institutions agreed to grant me access and assist me in contacting potential interviewees.

As far as Site B is concerned, I contacted the manager of a CSU who agreed to meet me in order to discuss my research in more detail. After our meeting this manager agreed to participate in the study and allowed me access to the ASB officers working within that particular CSU. After completing three interviews with this CSU, the manager also introduced me to four other institutions within the same site which later agreed to allow me access to their employees as well.

Finally, as far as Site C is concerned, I contacted two CSPs from this area in order to gain access to their ASB officers. After numerous emails, phones calls and a long waiting period one of the CSPs informed me that they could not participate in the study because at the time their main priority was to finalise their crime and disorder reduction strategy. I then decided to contact another CSP within Site C. Unfortunately, after many emails and phone calls I was told that none of the members of that CSP was interested in participating in this study. Hence, I decided to identify and contact another site with similar characteristics to Site C.

After following the same selection process as before, Site D was identified as a suitable alternative to Site C. A CSP which was in close proximity was contacted. As the

chair of that CSP explained to me over the phone, he and his colleagues were not able to participate in the study at the time due to significant workload. Due to the fact that no other suitable site could be identified and due to time constraints, I decided to focus solely on Site A and Site B. In order to ensure data saturation, however, I decided that I should interview twenty local enforcement agents from each site instead of fifteen as originally planned, i.e. ten with the relevant police force and ten with local practitioners.

Between May 2015 and April 2016 twenty-nine interviews were conducted in both sites. In Site A, nineteen interviews were conducted: (i) nine with police officers; and (ii) ten with local practitioners. In Site B, ten interviews were conducted: (i) four with police officers; and (ii) six with local practitioners. In total, thirteen police officers and sixteen local practitioners were interviewed from both sites. Although fewer interviews than what aimed for were conducted, it is important to note that data saturation was achieved.

### 1.4.5 Interview schedule

Prior to my field work, an interview guide was drafted which included a number of questions and possible follow-up questions based on which the interview sessions were structured.[19] Each interview session was divided into four parts all of which related to the potential creation of localised criminal codes. The use of semi-structured interviews was deemed necessary since they offer flexibility and allow participants to 'speak more widely on the issues raised' (Denscombe, 2014: 186).

During the first part of the interview sessions participants were asked to elaborate on what exactly their role was and on the work they were doing on a daily basis with regard to ASB. These introductory questions made interviewees 'feel comfortable enough to start telling their story' and were very beneficial in terms of building rapport (Hennink, Hutter, & Bailey, 2011: 113). Participants were then asked to define ASB and provide some examples which they would personally regard as anti-social. The purpose of this part was to gain an insight on how ASB was defined at a local level. If there was evidence to suggest that the implementation of these measures resulted in the indirect criminalisation of certain kinds of behaviour, it would have been necessary to scrutinise the nature of the behaviour criminalised.

[19] See Appendix C.

In the second part of the interviews, participants were asked to elaborate on the procedure followed after a potential incident of ASB was reported to them. Particular emphasis was paid on the 2014 amendments and whether these had any impact on the procedure followed by local enforcement agents. An equally important task of the second part of the interview sessions was to explore any informal interventions used by research participants when dealing with ASB.

During the third part of the interview sessions, attention shifted to the restrictions and/or obligations imposed on those against whom an injunction was issued. This part allowed interviewees to elaborate on the nature and extent of the restrictions/obligations imposed on the perpetrators. The underlying objective of this part was to explore whether the restrictions/obligations imposed met every prerequisite of the working definition of criminalisation formulated in chapter 3.

The final part of the interview sessions focused on the participants' intentions with regard to the implementation of ASB tools and powers, i.e. what they intended to achieve through the use of these measures. Initially, interviewees were asked whether they perceived the use of these measures as a means of punishing (based on how they personally perceived punishment) the perpetrators for their past behaviour. Questions then enabled participants to justify the use of these measures. The responses collected during the final part of the interview sessions can assist further in the theoretical critique of these interventions.

### 1.4.6 Coding and analysis

Shortly after every interview session, the recording was fully transcribed by me. This provided me with a very detailed account of each interview session. This was also very beneficial in terms of preventing research bias since it enabled me to constantly reflect on the interview sessions ensuring that these were not influenced by my personal views about the issues discussed (Bryman, 2016).

After all interview sessions were fully transcribed, they were uploaded on NVivo.[20] Prior to the initial coding, I went through every transcript in order to familiarise myself with the data obtained. This was followed by a second reading of the transcripts

[20] NVivo is a software designed to facilitate the analysis of research data. It allows researchers to upload their data (e.g. interview transcripts) and organise them based on their research objectives. Researchers are also able to create their own codes and sub-codes through which common themes can be identified.

through which key concepts were identified (coding) (Bryman, 2016). These concepts were given short titles in order to categorise important pieces information relating to this study (Green et al, 2007). This initial coding led to a more meaningful interpretation of my data (Bachman & Schutt, 2016). A sample of these codes was discussed during a supervisory meeting in order to safeguard the reliability and validity of my findings (Patton, 2002; Kirk & Miller, 1985). Following this meeting, I revised my codes in order for them to reflect more accurately the main topics addressed through the interview sessions.

The final stage of this process involved a thematic analysis of the data obtained. In particular, a number of themes which could assist me in addressing the primary research question of this thesis were identified (Bryman, 2016). Before elaborating further on the basis upon which these themes were selected, it is imperative to comment on the underlying rationale for choosing this particular method of data analysis. Other methods, such as grounded theory method, for instance, aim to formulate a new theory 'as the research proceeds' (Webley, 2012: 934-944). For this reason, 'data collection and analysis [should] take place simultaneously' (Thornberg & Charmaz, 2014: 153). In contrast to the grounded theory method, thematic analysis 'requires the researcher to focus on selected aspects [of the data collected which] … relate to the overall research question' (Schreier, 2014: 170). The interpretation of these aspects (or themes) and their correlation enables the researcher to address their underlying objectives of his study (Webley, 2012). As noted above, the main objective of this thesis is to test the validity of a pre-existing assumption rather than to formulate a new theory. It was for this reason that a thematic analysis was the most suitable method for this thesis.

The selection of the various themes was based primarily on two criteria. First, the repetition of certain topics was an initial indication about the importance of certain codes with regard to the implementation of the ASB tools and powers (Bryman, 2016). What was really important though was the relation of these recurring topics to the potential for creating localised criminal codes (Bryman, 2016). Here, it is worth noting that the findings of this study were categorised and presented in accordance with the interview guide.[21]

[21] See 5.2.

**Conclusion**

The impetus for this study came from the criticisms raised through theoretical analyses and empirical findings from previous studies which pointed out the possibility of imposing severe restrictions on perpetrators' liberty through non-criminal legislation. The possibility of implementing the injunction's first limb in a manner which would result in the indirect criminalisation of certain kinds of behaviour in the absence of the enhanced procedural protections was an alarming prospect. Legal rules which appear to allow for the imposition of criminal punishment should be subjected to the same level of scrutiny and constraints, such as procedural and evidential rules, as criminal rules.

Notwithstanding my personal views regarding indirect criminalisation and the potential adverse consequences of this phenomenon, I was constantly reflecting on how my 'own … assumptions can intervene [and influence] the research process' (Hesse-Biber & Leavy, 2005: 141). During the early stages of this study, for instance, it was essential to examine the theoretical validity of my original hypothesis on which this thesis is premised in order to ensure that this was not solely based on criticisms raised regarding the ASBO and its potential implementation (Green & Thorogood, 2014). This continued process of reflection on my own stance was also the main reason for interviewing not just police officers but also a range of other local enforcement agents who dealt with ASB on a daily basis and were responsible for the implementation of the relevant tools and powers. This enabled me to collect data from a variety of sources ensuring that the implementation of these measures was examined from various perspectives. Another important strategy used to safeguard objectivity was the use of semi-structured interviews which allowed participants to elaborate freely on their own experiences rather than being confined within the strict limits of fully structured interview schedules.

Another major ethical challenge encountered during this study related to my commitment to preserve site and participant anonymity, especially during the presentation of my findings. To achieve this, names of places, businesses and institutions have been altered and/or concealed when necessary. In order to ensure, however, that the findings are presented in a logical and coherent manner, a unique reference code has been assigned to each research participant. These reference codes allow me to provide more information about each of the quotes used during the presentation of my findings. Each code includes three pieces of information, e.g. Int.10 (LP) Site B. The first piece of information is a number given to each interviewee. This number has been chosen

randomly by me and does not relate to the actual order in which the interviews were conducted. This was deemed necessary to further protect participants' true identity. The second piece of information (LP or PO) relates to the participant's occupation. For police officers the 'PO' abbreviation is used. For local practitioners the 'LP' is used. The last piece of information (Site A or B) reveals the site in which each interview was conducted.

# Chapter 2: The moral foundations of the criminal law

Since the age of Plato, legal and political philosophers have introduced and defended principles and theories through which a fair balance between individual autonomy and state control is to be maintained (Mackenzie, 1981). This is done primarily by identifying and defending constraints on the conditions under which state interference with our liberty and freedoms can be warranted (Mill, 2002). Some of these theories, such as legal moralism, were formulated explicitly to set limits to the legitimate use of the criminal law by the state (Husak, 2008b: 196). Other theories, such as Mill's (2002: 4) harm principle, were introduced as broader political theories, but they were later adopted and modified by criminal law theorists, such as Feinberg (1984), in order to determine criminal law's proper boundaries.

This need to set constraints on the use of the criminal law by the state can be attributed primarily to its coercive nature. As Husak (2011: 102) maintains, the criminal law is the most coercive means of social control due to the nature of the sanctions imposed on those who violate its commands. The criminal law does not impose mere sanctions, but it punishes those who offend (Husak, 2008b). It is due to the coercive nature of criminal punishment that legal and political theorists seek not only to determine the circumstances under which the criminal law must be used, but they also theorise about the purposes that punishment should serve.

This chapter is divided into four parts. The first part aims at illustrating the distinctiveness of criminal rules (as opposed to non-criminal rules) in order to understand why the classification of the injunction as criminal or non-criminal is so vital, i.e. the first research question. The second part engages with some of the most prominent (and relevant to the purposes of this thesis) theories of criminal law. The close analysis of these theories provides an enhanced understanding of criminal law's moral limits in terms of the kinds of behaviour proscribed. In the third part, attention is shifted to the most influential account on punishment. The analysis of these theories does not only highlight criminal law's distinctiveness, but it can also assist in our theoretical critique of the injunction. If there is evidence to suggest that the implementation of the injunction's first limb has resulted in the indirect criminalisation of certain kinds of ASB, we should then evaluate this measure in the same way as we scrutinise criminal rules. Moreover, the

analysis of these theories and the need to maintain criminal law's distinctiveness will highlight further the need to formulate a test based on which it will be possible to identify criminal rules regardless of their official classification, i.e. the second research question. The chapter concludes by scrutinising on some of the most important principles underpinning criminalisation and punishment. Similar to the theories of criminal law and punishment, the close examination of these principles can assist our future analysis of the injunction.

**2.1 The distinctiveness of the criminal law**

As Ogus (2010: 27-28) explains, the state through various mechanisms of social regulation seeks to prevent certain 'undesirable outcomes'. Through criminal prohibitions, for instance, the state seeks to prevent unlawful killings and non-consensual sexual intercourse. Similarly, if a party to a contract fails to comply with his contractual obligations, the law of contract will seek to address this by ordering the defendant to pay damages to the injured party. Through this process, the law of contract ensures that individuals who fail to comply with their contractual obligations cannot simply walk away without any consequences, safeguarding at the same time the rights of the injured party. Through various mechanisms of regulation, therefore, the state purposefully attempts to control and/or influence our behaviour (Lacey, 2004). Thus, the criminal law is just one of many mechanisms of social control used by the state to regulate our behaviour (Ashworth, 2007-2008; Lacey, 2004). For most criminal law theorists, however, criminalisation is distinct from other methods of regulation because it allows for the imposition of punishment (Husak, 2008b). Simply put, criminal law does not impose mere sanctions on those who offend, but it punishes them (Husak, 2008b).

According to Feinberg (1965: 400) and Husak (2008b: 57), sanctions imposed by the criminal law comprise of two characteristics: (i) the imposition of 'hard treatment'; and (ii) the intentional communication of censure. For Feinberg (1965), 'hard treatment' refers to the financial and/or physical deprivations imposed on those who violate a given legal rule. As he has pointed out, however, not every deprivation imposed on the perpetrator amounts to 'hard treatment'. Based on his conception of 'hard treatment', a custodial sentence is a paradigmatic example of punishment (Feinberg, 1965). This is not the case though with parking fines which, according to him, constitute mere penalties (Feinberg, 1965). The difference between penalties and punishments lies, according to Feinberg (1965), in the second prerequisite of punishment, i.e. that the deprivation must

intentionally comunicate censure. Based on his account, both penalties and punishment aim to prevent certain kinds of 'undesirable behaviour', such as unauthorised parking (Feinberg, 1965: 399). But punishment has an additional element. Punishment, according to him, 'is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority … or of those "in whose name" the punishment is inflicted' (Feinberg, 1965: 400). This conceptualisation of punishment is in line with Husak's (2008a: 104) account of punishment according to which 'a state response to conduct does not qualify as punitive unless it is designed to censure and to stigmatise'.

Based on Feinberg and Husak's accounts, criminal punishment does not only interfere with the perpetrator's liberty, but it also labels him as a serious wrongdoer. It conveys a message to both the offender and the rest of the community that the behaviour in question constitutes a serious moral wrong which is worth of society's reprobation. Criminalisation, therefore, symbolises society's 'formal and solemn pronouncement of the moral condemnation' against the kinds of behaviour proscribed (Hart, 1958: 405; Dimock, 2014). Through criminalisation a dialogue is generated between the community and individual citizens where the former does not only seek to deter the latter from offending, but it also aims to inform them about the principles by which they should abide (Duff, 2001; Walters, forthcoming). Through this dialogue, as members of the community we are not only provided with 'prudential reasons for desistence', but we are also provided with a moral one (von Hirsch, 1993: 12). The criminal law assumes the role of an educator who seeks to communicate to its subjects the core values and principles that underpin our society (Coffee, 1991). Seen in this way, criminalisation symbolises the moral denunciation of society towards both the offender and the wrong committed (von Hirsch, 1993).

It would be instructive here to examine in more detail how this communicative and educational function of the criminal law operates in practice. One of the most illustrative examples of this, is 'hate crimes'. Hate crimes are offences which are 'motivated by "hate" or "prejudice"' (Walters, 2014b: 2). Prejudice, in this context, can relate to certain characteristics of the victim, such as religion and ethnicity.[1] Hate crimes are regarded as more serious than their parallel offences due to their impact, which is

[1] Crime and Disorder Act 1998 section 28.

likely to be more severe (Iganski, 2008). Compare, for example, an assault which is aggravated by religious hostility under section 29 of the Crime and Disorder Act 1998 and an assault under section 39 of the Criminal Justice Act 1988. The criminal law draws a distinction between the two offences as a means of emphasising society's reprobation towards crimes motivated by hatred or prejudice. This is a direct message to the public that our society will not tolerate certain forms of hostility against a group of individuals due to their religious and/or ethnic background since conduct of this nature 'undermine[s] fundamental values of tolerance, acceptance and equality' (Walters, 2014a). Criminal law's primary objective, therefore, is to maintain certain positive norms and dilute existing (negative) norms (Robinson, 1996). As Robinson (1996: 212) explains, criminal law is the only set of legal rules in a diverse contemporary liberal society which 'transcends cultural and ethnic differences' because it focuses on society's core values.

In order, however, for society to fully comprehend the moral messages conveyed through criminalisation, it is essential for the criminal law to remain distinct from other forms of regulation. As Husak (2004: 211) puts it, 'the criminal law is and ought to be *different* – importantly dissimilar from other kinds of law' (emphasis in the original). To hold otherwise, is to blur the normative distinction between the criminal law and other forms of social control (Coffee, 1992). As a result of this, those to whom 'the criminal law is directed' at might not be able to comprehend the moral wrongfulness of certain kinds of behaviour.[2] They will not be able to understand that there are both moral and prudential reasons for not violating criminal law's commands (von Hirsch, 1993).

Criminalisation not only communicates society's censure towards particular kinds of behaviour, but it also expresses society's reprobation towards those who offend. Society's condemnation towards the perpetrator is articulated through criminal conviction. To be convicted for an offence is to be publically condemned for violating society's core values (Walters, Forthcoming). It is for this reason that a criminal conviction can stigmatise offenders and can have a devastating effect on their future lives (Ashworth, 2006). If, for example, the perpetrator is found guilty of an offence which can lead to the imposition of a custodial sentence, then this offence will be registered on the perpetrator's record.[3] This can have a detrimental impact on the perpetrator's future

[2] As Chalmers and Leverick (2014: 74-75) contend, not every criminal prohibition addresses the entire population. Rather, according to them, certain offences (especially regulatory ones) are directed at specific groups of people, such as those against whom a CBO is issued.
[3] See National Police Records (Recordable Offences) Regulations 2000 regulation 3(1)(a).

prospect of employment since he can be automatically disqualified from certain professional bodies and holding public office.[4] Although the perpetrator has served any direct criminal sentence imposed on him as a result of his past wrongdoings, the label of 'offender' may continue to have an adverse impact on his future.

It is due to the combination of 'hard treatment' and censure that criminal punishment is regarded as the most coercive means of social control (Packer, 1968; Husak, 2011). It is because of punishment's coercive nature that enhanced procedural protections are afforded to those charged with a criminal offence (Henry & King, 2016). In particular, under Article 6 of the ECHR a number of procedural and evidential rights are provided to those who are prosecuted for the commission of a criminal offence as a means of ensuring a fair trial. The most important of these include Article 6(1) ECHR, which provides, 'in the determination of [someone's] civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing'; Article 6(2) ECHR, which provides that every individual 'charged with a criminal offence shall be presumed innocent until proven guilty according to law'; and Article 6(3)(d) ECHR, which provides that a defendant should be allowed to examine all the evidence against him including any witnesses who wish to testify. Consequently, the label attached to each legal rule is of paramount significance since it will determine the level of protection that should be afforded to those who have allegedly committed the wrong in question.

In principle, therefore, criminalisation should be reserved only for the most serious wrongs, the commission of which undermines some of our society's core values and principles.[5] A prime example of this is the unlawful infliction of GBH which, according to Feinberg (1984: 10), is amongst those wrongs which 'are crimes (under one name or another) everywhere in the civilised world, and no reasonable person could advocate their "decriminalisation"'. To be convicted of an offence such as the unlawful infliction of GBH, is to be labelled as a serious wrongdoer worthy of reprobation by the rest of the polity.[6] This is one of the main reasons that a criminal conviction can have a devastating effect on the perpetrator's future prospect of employment as employers are

[4] For example, under section 66(3)(c) of the Police Reform and Social Responsibility Act 2011 someone will automatically be disqualified from running as a candidate to become a Police and Crime Commissioner if they have been convicted for a recordable offence. See Bennett (2016).
[5] This is also one of the reasons why the criminal law attracts more academic scrutiny as to its appropriate use and limits.
[6] For a more elaborated analysis of this wrong see Demetriou (2016).

less eager to employ individuals with a criminal record (Podmore, 2012). It should be acknowledged, however, that the criminal law does not restrict itself only to *mala in se* offences, i.e. independently wrongful behaviour such as the unlawful infliction of GBH (Duff, 2007). Instead, as Duff (2010: 102) explains, the 'English criminal law includes a number of offences that other systems do not classify as "crimes"', i.e. they criminalise conduct which is not inherently wrongful but becomes wrongful due to its criminalisation. This is one of the main reasons why legal philosophers formulate and defend theories of criminal law. Formulating an ideal benchmark regarding the moral limits of the criminal law can lead to its principled and coherent development through which its distinctiveness can be preserved.

Under and indirect criminalisation are both problematic because they undermine criminal law's distinctiveness. As discussed earlier,[7] the former refers to the use of non-criminal rules, such as the civil preventive measures (e.g. the injunction and the TPIMs), as a means of addressing behaviour which is already proscribed by the criminal law (Ashworth & Zedner, 2010). As mentioned above, to label a particular kind of behaviour as a criminal wrong is to formally denounce it as behaviour that contradicts society's core values. If this kind of behaviour, however, is addressed through non-criminal rules, then those subjected to the criminal law might not be able to comprehend the moral message conveyed through *direct* criminalisation. Consequently, those subjected to the criminal law will no longer be provided with a moral 'reason for desistance' (von Hirsch, 1993: 12). Their decision as to whether they should commit a criminal wrong will be based solely on prudential grounds. A possible consequence of this might be an increase in criminality.

Indirect criminalisation is problematic for two main reasons. First, if we accept Husak's (2011) claim that the criminal law is the most coercive means of regulation because it allows for the imposition of punishment, then punishment should only be imposed through criminal prosecution and upon conviction, rather than through the implementation of non-criminal rules which cannot guarantee the presence of the enhanced procedural protections. To prevent this, it is necessary for legal rules which appear to allow for the imposition of punishment to be classified as criminal. This of course requires a mechanism based on which we can determine whether a particular rule

[7] See 'The pre-2014 approach to anti-social behaviour'.

should be regarded as criminal regardless of the label attached to it by the legislature.[8] Through this examination we can ensure that non-criminal rules which allow for the imposition of punishment are subjected to the same theoretical critique and constrains as criminal rules. Secondly, similar to under-criminalisation, indirect criminalisation jeopardises the moral distinction between the criminal law and other forms of regulation. If punishment is imposed through non-criminal rules, then members of the public might not be able to fully comprehend the moral blameworthiness of those found guilty of an offence. This again might provide members of the public only with prudential reasons to commit no offence.

### 2.2 Criminal law's moral boundaries

Thus far, our discussion focused on criminal law's distinctiveness when compared to other forms of social regulation. The overall objective of the above discussion was twofold. First, it was to illustrate what is unique about the criminal law when compared to other forms of regulation and why it is necessary to preserve this moral distinction (the first research question of this thesis). It is due to this unique educational character of the criminal law, and the message that punishment conveys to society, that leads legal theorists to introduce and defend constraints to the ambit of the criminal law. Secondly, it was to demonstrate why it is vital to be able to *identify* and *address* instances of indirect criminalisation. This chapter now proceeds to examine the content of some of the most prominent (and relevant to the purposes of this thesis) theories of criminal law.

Although many legal and political philosophers have introduced and defended normative accounts of criminalisation, we currently lack common consensus as to the kinds of behaviour that should fall within the ambit of the criminal law.[9] Nonetheless, it is still important to examine more closely these theories for two reasons. First, despite the lack of common consensus regarding the ambit of the criminal law, the rich academic literature in this area and legal philosophers' endeavours to formulate an ideal account of criminalisation suggests that the criminal law is indeed special and that it should only be used against specific types of behaviour. As Husak (2004: 211) puts it, 'the criminal law is and ought to be *different* – importantly dissimilar from other kinds of law' (emphasis in the original). To hold otherwise, is to blur the normative distinction between the

[8] See 3.2.
[9] This lack of common consensus is evident through the close analysis of some of the most prominent and influential theories of criminalisation discussed in this chapter.

criminal law and other mechanism of regulation used by the state. It follows that if we wish to maintain criminal law's distinctiveness, we must ensure that the kinds of behaviour criminalised are different from those addressed through other mechanisms of social control.

Secondly, the close analysis of these theories can assist in our theoretical critique of the injunction's first limb if there is indeed evidence to suggest that it has been operating as a *de facto* criminal rule. For instance, if the implementation of the injunction's first limb has resulted in the criminalisation of behaviour which is merely offensive,[10] we can then use the analysis of these moral accounts in order to examine what might potentially be problematic about the criminalisation of this kind of behaviour.

For the purposes of this thesis, four of these theories of criminal law are scrutinised: (i) legal moralism, (ii) the liberal approach; (iii) paternalism; and (iv) the criminalisation of offensive behaviour. Each of these theories is closely analysed in order to examine the potential grounds upon which criminalisation can be warranted.

### 2.2.1 Wrongs worth criminalising

Based on Duff's (2010) account, the criminal law should only be used to address wrongs which are public in nature. What makes a particular kind of behaviour a public wrong, according to Marshall and Duff (1998), is that wrongs of this nature concern society as a whole and thus necessitate a collective response by the entire polity. The reason for this is that the criminal law aims to safeguard certain values which are fundamental to society (Ashworth & Horder, 2013). Hence, criminal wrongs should not be seen as wrongs done to a particular victim, but they should be seen as wrongs done to the 'common good' (Marshall & Duff, 1998: 11-12). This of course is not to disregard or undermine the importance of the harm suffered by the victim (Ashworth & Horder, 2013), but rather it is to highlight the fact that the individual should be seen as an integral part of society. The state assumes an obligation to challenge the perpetrator's behaviour on behalf of the entire society (Marshall & Duff, 1998).

Based on Marshall and Duff's (1998) public/private wrong distinction certain wrongs are regarded as public wrongs because by their nature they violate society's core values. According to them, what makes a particular kind of behaviour a 'public wrong'

[10] See 2.2.5.

is its nature rather than its severity (Marshall & Duff, 1998). To illustrate this, consider the following hypotheticals. **A**, Sam recklessly causes minor damage to Andrew's property worth £100. **B**, Sam also fails to comply with his contractual obligations and as a result of this, Andrew, the other contracting party, incurs losses totalling £10m. Although in the second scenario Andrew loses 100,000 times the amount of that in the first scenario, it is only the first scenario that can qualify as a 'public wrong', i.e. criminal damage. This, based on Marshall and Duff's (1998) account, can be attributed to the nature of criminal damage which violates Andrew's right to property, one of society's key values. In contrast, contractual agreements are a private matter between Sam and Andrew who voluntarily choose to owe each other certain obligations. Although Sam's conduct can be regarded as morally reprehensible, it does not violate one of society's fundamental values. Consequently, in the second scenario society has no standing for intervening, despite the severity of the loss suffered by Andrew.

At first sight, Duff and Marshall's public/private wrong distinction can be criticised on two grounds. The first criticism relates to their decision to focus more on the nature rather than the severity of certain wrongs. As Moore (2014) explains, although breach of contract and torts are not wrongs worth criminalising the public/private wrong distinction adopted by Marshall and Duff is problematic. According to him, what renders a particular kind of behaviour worth criminalising is the severity of the wrong committed (Moore, 2014). Based on this account, the criminal law should only concern itself with serious moral wrongs (Moore, 2014). As he goes on to explain, even if certain wrongs violate some of society's core values, we still need not resort to criminalisation if its potential benefits are outweighed by other values, such as the presumption of liberty (Moore, 2014). Minor infractions of those core values should not be criminalised. Secondly, if the public/private wrong distinction is to survive close scrutiny it is necessary to decide which rights/values are fundamental to our society. [11] Although the criminalisation of certain wrongs, such as the unlawful infliction of GBH, can hardly be disputed, this might not the case when we move away from paradigmatic *mala in se* offences.

It is evident from the above analysis that the public/private wrong distinction drawn by Duff and Marshall provides some general guidelines as to what kinds of wrongs

[11] See 3.2.1.

should be the proper concern of the criminal law, but further guidance is needed. This can be achieved by a closer analysis of some of the most prominent theories of criminal law through which we can determine which kinds of wrongs should be considered for criminalisation. Moreover, the public/private wrong distinction provides us with an initial indication of how the criminalisation of ASB through the injunction's first limb could be problematic. Although certain kinds of ASB might be treated as *de facto* public wrongs, i.e. to be criminalised through the injunction's first limb, it should be remembered that each injunction applies to specific individual(s) rather than the entire polity. In effect, this means that others could behave in exactly the same manner (i.e. commit those public wrongs) as those against whom an injunction was issued without any legal consequences. This is of course in stark contrast with Duff and Marshall's public/private wrong distinction. Simply put, if the kinds of behaviour proscribed through the injunction's first limb were truly public wrongs, then the entire polity should have been prohibited from committing those wrongs.

### 2.2.2 Legal moralism

Legal moralism starts from the premise that the immorality of an activity can justify its criminalisation (Devlin, 1965; Moore, 2010). According to Devlin (1965), morality constitutes one of the most fundamental components of our society and for this reason the legislature has a legitimate right to use the criminal law as a means of protecting morality in order to safeguard the existence of our society. The pressing question is under what circumstances a particular kind of behaviour is regarded as immoral and thus worth criminalising for a legal moralist?

Devlin's (1965) formulation of legal moralism embraces the idea that the criminal law operates on the standard of a reasonable man rather than on what the majority of the community believes. Simply put, if a reasonable man would have regarded a specific conduct as immoral, then the conduct at stake should be treated as such (Devlin, 1965). This is not to suggest that every moral wrong should fall within the ambit of the criminal law. Rather, as Devlin (1965: 7-17) explained, we should be able to appreciate an individual's freedom by punishing only those wrongs which 'lie beyond the limit of tolerance'. Accordingly, what makes an immoral act a public wrong is the requirement of genuine reprobation (Devlin, 1965). In other words, that wrong should be judged deliberately by the state as a wrong which 'is injurious to the society' if it is to justify the use of the criminal law (Devlin, 1965).

A possible objection to Devlin's theory of criminalisation emanates from Packer's account on morality and its relation to criminalisation. Packer (1968) acknowledged that there is a close relation between morality and the condemnatory function of punishment. He believed, however, that 'an automatic enforcement of morals' is impossible and unacceptable in any contemporary liberal society (Packer, 1968: 265). Enforcement of morality could have been permissible in a monolithic society where individuals share the same religious beliefs and ethnic background (Packer, 1968). The enforcement of a specific set of moral values in a pluralistic society 'carries a heavy cost in repression' due to the fact that there is a wide disagreement among the public as to the moral status of certain activities (Packer, 1968). While Devlin suggested that immorality is a justifiable basis for criminalisation, for Packer, enforcement of morality seems to undermine the very essence of having a liberal society. For Packer (1968: 265), the more diverse a society is, 'the more foreign to its ethos' that enforcement of morality would be. Dictating a moral code through criminalisation, therefore, appears to be unwarranted in such society.

Moore's version of legal moralism seeks to depart from Devlin's account. According to Moore (2014: 199), Devlin's account is based on 'the intensity of [people's] disgust and not by any criterion about the content of their moral beliefs'. Moore's (2010) account starts from the premise that criminalising immoral acts which cause a prohibited result, such as GBH, in the absence of any valid excuse can be warranted. For Moore (2010), moral wrongdoing consists of wrongs committed voluntarily and intentionally by the offenders. If someone acts in such a manner and he is unable to provide any excuse for his actions, then this provides the state with a justifiable ground for criminalisation (Moore, 2009). Moore, an advocate of retribution,[12] contends that retributivism and legal moralism are inextricably linked. Hence, legal moralism should only be concerned with culpable offenders and must deliver *'just deserts'* (Moore, 2009: 31). Nevertheless, according to Moorean legal moralism, not every wrong should be subjected to criminalisation. Conduct which simply becomes wrong as a result of criminalisation, i.e. *mala prohibita* offences, is not to be regarded as a moral wrong (Moore, 2009). This is not to suggest that *mala prohibita* wrongs should never be criminalised. Rather, as Moore (2014: 204) maintains, 'to be protected from criminalisation… an action must be a

[12] See 2.3.2.

sufficiently minor wrong that the good of its punishment and prevention is outweighed by the costs the state incurs in achieving such punishment and prevention'.

At first sight, Moore's account provides more guidance than Devlin's legal moralism as to when conduct constitutes a moral wrong. His account, however, does not provide any precise guidance as to what constitutes an independent wrongful act. What Moore (2009) claims is that the criminal law should follow the legal moralist principle. According to this principle if the act at stake is not condemned by morality, then the criminal law should not do either (Moore, 2009). The legislature must observe and determine what the current social morality dictates and decide what is to be criminalised (Moore, 2009).

Although deciding what constitutes immoral behaviour can be very contentious, especially in a contemporary liberal society, legal moralism provides another limb to our evaluation of criminal offences. In particular, if through the implementation of the injunction's first limb certain kinds of behaviour are criminalised due to their perceived immorality (in line with Devlin's legal moralism), it will be necessary to scrutinise the morality of the ASB in question. If what has been criminalised through the injunction's first limb is behaviour which is not regarded as immoral by the standards of a reasonable man, then it will be hard to justify the implementation of the injunction.

### 2.2.3 The liberal approach

In contrast to legal moralism is the harm principle. This is a political theory which is situated within the liberal school of thought and not specifically designed to regulate criminalisation (Ashworth & Horder, 2013). The main impetus for the creation of this principle was to establish an appropriate balance 'between individual independence and social control' (Mill, 2002: 4). Based on Mill's (2002: 8) formulation of the harm principle, state interference with our liberty can only be warranted if it aims 'to prevent harm to others' or to eliminate the risk of causing harm to others. For Mill (2002), the fact that someone chooses to harm themselves is insufficient to warrant any interference by the state.

At first sight, criminalising behaviour which is harmful or can potentially cause harm to others appears to be a legitimate ground for criminalisation in a contemporary liberal society. The unlawful infliction of GBH, for instance, can be regarded as a paradigmatic example of harmful behaviour. This kind of behaviour is an inherently

harmful wrong and its criminalisation can hardly be disputed in a liberal society. The severity and blameworthiness of unlawful GBH is further evident by the fact that those who are found guilty of intentionally inflicting GBH on others face a maximum sentence of life imprisonment.[13]

Nonetheless the liberal approach and its advocates face a number of challenges. First, if the liberal approach is to be adopted, then 'harm' and what qualifies as harm need further exploration and qualification (Feinberg, 1989). Similar to immorality, the notion of harm can be interpreted very widely especially when moving away from paradigmatic offences such as the unlawful infliction of GBH. As Feinberg (1984) pointed out, what constitutes harm and the extent of harm required in order for criminal law's intervention to be warranted can vary significantly based on the characteristics of the victim. Suppose that in a deeply religious society the majority of people believe that atheists and their views jeopardise the cohesiveness of society and that if not addressed they can cause social unrest. From the majority's perspective, atheism can potentially lead to serious violence and thus its criminalisation is warranted. From a liberal perspective, however, to criminalise atheism is to deny atheists the right to express themselves in the way they wish and constitutes an unlawful interference with their liberty. As Mill (2002) explained, individual liberty should not only be protected from the will of the sovereign, but it must be protected from the will of the majority as well.

It follows from the above discussion of the liberal approach that the notion of harm should not be left unrestrained if we are truly committed to striking a fair balance between individual autonomy and criminalisation. According to Feinberg (1984: 188-189), the criminal law should only deal with 'genuine harm and not mere annoyance, inconvenience, hurt, or offence'. Hence, the main challenge faced by the proponents of this theory is to decide at what point we shall draw the line between those harms that are the proper concern of the criminal law and those which are not. Equally, when scrutinising instances where the implementation of the injunction constituted a form of indirect criminalisation, it is necessary to explore whether the kinds of ASB criminalised caused 'genuine harm' to others or if it was behaviour which caused 'mere annoyance'. Based on Feinberg's account, only the criminalisation of the former kinds of ASB can be warranted.

[13] Section 18 of the Offences Against the Person Act 1861.

A second challenge faced by the advocates of the harm principle relates to pre-emptive criminalisation. Pre-emptive criminalisation can be warranted on the ground that it would be paradoxical if the legislature has decided that certain wrongs should be criminalised because they are inherently harmful, but has failed to punish those who either plan or who unsuccessfully attempt to commit wrongs of this kind (Duff, 1997). Although the prevention of harm appears to be a justifiable ground for criminalisation, it also raises the question: how pre-emptive can the state really be? What is the required degree of remoteness between the potential harm proscribed and the actual harm that the principal offence seeks to prevent?

The need to set limits to pre-emptive criminalisation is particularly evident when scrutinising offences targeting terrorism-related activities. One of the most illustrative examples is section 1(2)(b)(ii) of the Terrorism Act 2006 which criminalises the publication of a statement which encourages others 'to commit, prepare or instigate' an act of terrorism. In order to establish liability for this offence, one needs only to prove that the person publishing this statement has been at least 'reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement'. Although this offence prevents, through criminalisation, the publication of any statement that can encourage others to commit an act of terrorism, it also raises concerns as to how pre-emptive the state can be. What if Sam publishes a statement which can potentially encourage others to commit such an act but no one reads his statements? Similarly, what if none of those who read Sam's statements is likely to commit an act of terror?

Based on Feinberg's formulation of the harm principle, pre-emptive criminalisation can be warranted even in cases where the behaviour criminalised is unlikely to lead to the infliction of harm. According to him, 'if the harm in question is very great, then a very small likelihood of its occurrence will' be sufficient to warrant criminalisation (Feinberg, 1984: 190). Seen in this way, most of the anti-terrorism legislation enacted in recent years can be warranted based on the level of risk posed by acts of terror. In effect, however, this can result in the criminalisation of behaviour which is far remote from the infliction of any harm and thus jeopardise the moral distinction between the criminal law and other forms of regulation.[14]

[14] See 2.1.

Similar to the analysis of legal moralism, the examination of the liberal approach can provide the basis for evaluating the implementation of the injunction's first limb if this has resulted in the indirect criminalisation of certain kinds of harm. The importance of this analysis also lies with ASB's statutory definition. As noted earlier, the current definition of ASB enables local enforcement agents to intervene pre-emptively before someone's behaviour actually causes 'harassment, alarm or distress'.[15] Consequently, if there is evidence to suggest that the criminalisation of certain kinds of ASB is justified on the basis of preventing the infliction of harm, we can then reflect back on Feinberg's formulation of the harm principle in order to assess and/or challenge the legitimacy of this form of criminalisation. Although, for instance, the behaviour criminalised might have caused 'alarm and distress', it can still be justified as a pre-emptive intervention if it aims at preventing the infliction of harm. This of course will require a sufficient degree of proximity between the behaviour criminalised and the harm prevented otherwise the injunction will hardly be justified.

### 2.2.4 The paternalistic approach

In contrast to Mill's formulation of the harm principle, legal paternalism allows for the criminalisation of behaviour which can cause harm to the wrongdoer himself rather than to others (Husak, 2012). Paternalism works from the premise that people sometimes need to be protected not just from others but from themselves as well either because they are not capable of making the right decision or because they might simply refuse to make it. Parents, for example, might not allow their children to ride their bikes in the city centre because they believe that they do not possess the necessary skills required to do so. This means that the children are not allowed to choose whether they will ride their bikes in the city centre or not. By the same token, under paragraph 83 of the Highway Code a duty is imposed on every motorist to wear a protective helmet.[16] In theory, every motorist is denied the opportunity to choose whether he wishes to buy a protective helmet or not. Sam, for instance, might have been tempted not to buy a protective helmet simply to save some money. Under certain circumstances, therefore, a higher authority assumes that its subjects should be denied the opportunity to choose either because they are not capable

[15] See 'Conceptualising anti-social behaviour under the current law'.
[16] Feinberg (1989) provided a number of subcategories of paternalism as well based primarily on the intention of the one who acts in a paternalistic way.

or because they can be tempted not to make the right decision, e.g. to prioritise their safety over the extra cost of buying a protective helmet.

The main cause for concern with regard to paternalistic interventions, therefore, is that they appear to undermine individual autonomy by denying individuals the opportunity to choose freely what is in their best interest (Gert & Culver, 1976). As Husak (2012) contends, however, paternalism as a reason for action is not *prima facie* objectionable. For a legal paternalist, the interference of the state is usually justified on the grounds of 'welfare, good, happiness, needs, interests, or values of the person being coerced' (Dworkin, 1971: 108). To support his argument Husak (2012) uses the example of a patient who is driven to a hospital unconscious where lifesaving surgery should be carried out. The surgeon conducting the operation acts in a paternalistic manner. Thus, under certain circumstances paternalistic interventions can be justified especially when dealing with individuals who are not able to decide for themselves.

Similarly, the criminal law sometimes adopts a paternalistic approach in order to protect certain groups of individuals. To illustrate how paternalistic interventions operate, consider sections 9 - 15 of the Sexual Offences Act 2003 which proscribe the participation of a child in any sort of sexual conduct regardless of consent. The criminal law intervenes in this case in order to protect a specific group of people from taking what the state assumes to be the wrong decision. In this case, regardless of a minor's desire to engage in a sexual activity, the criminal law assumes a responsibility to protect that individual from harming himself.

As Simester and von Hirsch (2011) rightly point out, the justifiability of these interventions should also be examined in light of the mechanisms used by the state to achieve these desired outcomes. For them, any paternalistic intervention by the state should take place through the civil rather the criminal law due to criminalisation's coercive nature (Simester & von Hirsch, 2011). They contend that under certain circumstances the adverse effects of a criminal conviction, such as its stigmatising effect, can outweigh the effects of taking the wrong decision (Simester & von Hirsch, 2011). For them, if 'limited state intervention of a civil character [can be] justified, then recourse to the criminal law should not follow' (Simester & von Hirsch, 2011: 160).

Based on the above analysis of paternalism, if local enforcement agents use the injunction on paternalistic grounds we can then evaluate its implementation with the

limits of justifiable paternalism in mind. Suppose that local enforcement agents believe that Andrew is not capable of making the right to decision to attend drug-related treatment and decide to apply for the imposition of a positive obligation in order to force him to attend a number of sessions.[17] Based on Simester and von Hirsch's (2011) account, if the positive obligation imposed on Andrew constitutes a form of criminal punishment, then its imposition can hardly be justified.

2.2.5 Criminalising offensive behaviour

Thus far, the theories of criminalisation examined have focused either on the prevention of serious harm or the preservation of morality. For Feinberg (1985), under certain circumstances the criminal law can also be deployed against certain wrongs which at first sight appear to be relatively trivial, such as behaviour which causes annoyance and anxiety. In this context, Feinberg (1985: 1) used 'the word "offence" to [describe] the whole miscellany of universally disliked mental states' which fall within his offence principle. Based on his account, the invocation of the criminal law can be warranted only for the prevention of 'serious offence to persons other than the actor, and that it is probably a necessary means to that end' (Feinberg, 1985: 1).

There remains the question of course as to where we can draw the line between offensive behaviour which is worth criminalising (serious offence) and offensive behaviour which should not fall within the ambit of the criminal law, i.e. behaviour which is merely offensive. For Feinberg (1985: 1-2), the criminalisation of offensive behaviour can only be warranted 'when [one of the abovementioned "disliked mental states" was] caused by the wrongful (right-violating) conduct of others'. According to his account, a prime example of a right-violating offence would be a noisy bus passenger who violates other passengers' right to privacy (Feinberg, 1985: 23). Feinberg's (1985: 2) distinction starts from the premise that 'the law does not concern itself with trifles'. For this reason, Feinberg (1985: 25-26) formulated a number of constraints in order to prevent any 'intuitively unwarranted legal interference' through his offence principle. These mediating principles enable us, according to him, to assess the severity of the offence at stake and determine whether its criminalisation can be warranted. These principles include: (i) the extent and severity of the offence caused; (ii) whether it would be reasonable for the perpetrator to take any steps to avoid offending others; (iii) whether

[17] As discussed in 4.1.2, under the 2014 Act positive obligations can be imposed on those against whom an injunction or a CBO is issued.

the victim voluntarily chose or put themselves in a position where there was a risk of being offended; and (iv) whether the victim has been offended due to their 'abnormal susceptibility to offence' (Feinberg, 1985: 35).

It is worth noting that as far as the 2014 Act is concerned, none of Feinberg's criteria apply, at least as the law appears on the statute book, in relation to the issue of an injunction. Instead, it is expected that local enforcement agents will exercise their discretion appropriately and use the injunction only against ASB which is 'more than merely offensive'.

Although, Feinberg's mediating maxims appear to restrict criminalisation to behaviour which is more than merely offensive, according to Simester and von Hirsch (2011), Feinberg's account still remains over-inclusive. They attribute this to the fact that we currently live in a society which is less tolerant than before (Simester & von Hirsch, 2011). For them, Feinberg's account should be complemented with the requirement of wrongfulness (Simester & von Hirsch, 2011). They argue that some general principles should be formulated as to 'when the offence becomes a wrong, one that relates to the conduct's showing a manifest lack of respect or consideration for others' (Simester & von Hirsch, 2011: 137). Based on their account, if we are to criminalise offensive behaviour, we must ensure that we only target behaviour which is inherently wrongful rather than behaviour which becomes wrongful due to its impact on others.

Accordingly, if we are to criminalise offensive behaviour, we should focus only on behaviour which constitutes a moral wrong. To illustrate how this can apply in practice, consider the following hypothetical. Suppose that Andrew tends to stand in the middle of the high street in early afternoons and continuously makes racist comments towards people who pass by. As a result of Andrew's behaviour many bystanders are offended and are fearful ('disliked mental states') about their own safety. Andrew's behaviour in this context is more than merely offensive due to the fact that it includes an element of racial hatred. Even if no spectator was offended by his behaviour, the imposition of criminal punishment on Andrew can still be warranted on the basis that his behaviour constitutes a moral wrong regardless of its impact on others.[18] As Lawrence

[18] A similar approach is adopted by Hörnle (2006: 140) who argues that if someone's behaviour violates the rights of other people, 'then is no need to ask whether it is harmful or offensive'. On this view, since the behaviour at stake violates someone's right then it should be considered for criminalisation irrespective of the label attached to it, either harmful or offensive.

(2002) points out, allowing hate crimes to flourish jeopardises the cohesiveness of our community since it violates one of society's core principles, i.e. the principle of equality. This additional requirement of wrongfulness reiterates the need to reserve criminalisation for the most serious kinds of wrongs.

From a theoretical perspective, the importance of the above distinction between behaviour which is merely offensive and behaviour which is more than merely offensive lies with the need to preserve criminal law for conduct which is truly worthy of reprobation. For the purposes of this thesis, what also matters about this distinction (as well as for the other theories of criminal law examined earlier) is that this can be utilised to assess the implementation of the injunction's first limb. Simply put, if there is evidence to suggest that its implementation has resulted in the indirect criminalisation of behaviour which is merely offensive, we can then reflect back on our analysis of the 'Offence Principle' and criticise local enforcement agents for extending the net of social control to 'trifles', i.e. behaviour that falls within the realm of everyday human interaction.

As illustrated above, none of the theories of criminal law examined here is unproblematic or completely rigid in application. The close analysis of these theories enhances our understanding regarding the basis upon which criminalisation can be warranted and what can be problematic about each approach. It was evident through our earlier theoretical analysis of the relevant statutory provisions that what can be regarded as anti-social can range from mere 'incivilities' between neighbours to behaviour which is already proscribed by the criminal law, such as criminal damage.[19] It has been imperative, therefore, to scrutinise a number of theories which can potentially assist our future theoretical critique of the injunction's first limb.

### 2.3 Punishment

Any attempt to assess the legitimacy of a criminal rule should not be limited to the kinds of behaviour criminalised, but it should also extend to the potential sanctions imposed on those who are found in breach of this rule. As Duff and Garland (1994: 2) point out, justification is needed 'because [punishment] is morally problematic'. This is due to the nature and severity of the sanctions imposed by the criminal law on those who offend. On this view, it is morally objectionable to impose such sanctions on individuals unless sufficient justification is provided (Duff & Garland, 1994). For this reason, the

[19] See 'Conceptualising anti-social behaviour under the current law'.

imposition of punishment has to be justified by the state (Husak, 2008a). It is also for this reason that enhanced procedural protections are afforded to those facing the prospect of criminal punishment (Ashworth & Zedner, 2015).

Consequently, in cases where the implementation of injunction's first limb constitutes a form of criminalisation, our evaluation of this measure should move beyond the kinds of behaviour criminalised and scrutinise the sanctions imposed as well. This requires an examination of the basis upon which punishment was imposed and what its ultimate objectives were. To achieve this, it is essential to critically engage with a number of theories of punishment which can potentially be relevant to our future analysis of the injunction.

### 2.3.1 The consequentialist approach

For some legal commentators, such as Bentham (2007), what really matters about the imposition of punishment is its net result, the consequentialist approach. For them, if the net result of punishment is a positive one then its imposition can be warranted (Bentham, 2007). Conversely, if the net result is a negative one then the imposition of punishment cannot be warranted (Bentham, 2007).

What constitutes a positive outcome in this context, however, varies amongst consequentialist theorists. Some consequentialists, for example, pay particular attention to the notion of utility. According to Bentham (2007), punishment is an inherently evil practice due to its adverse consequences. Nonetheless, it can still be warranted if it promotes 'the happiness of the party whose interest is in question … [or if it] prevent[s] the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered' (Bentham, 2007: 2). As far criminal offences are concerned, the 'party whose interest is in question' is the entire community, since these are wrongs done to the community as opposed to the individual victim.[20] If the punishment imposed on the perpetrators results in lower re-offending (something which benefits the entire community), then its imposition can be warranted. Similarly, from a consequentialist perspective, if there is evidence to suggest that the restrictions imposed on those against whom an injunction has been issued have been successful in terms of preventing further ASB, then their imposition can be warranted.

[20] See 2.2.1.

For Lacey (1988), who adopts a communitarian approach to punishment, criminal law's response to those who offend should be structured in line with the principles of welfare and autonomy. According to her, punishment can be warranted if it manages to address the needs of both the victim and the perpetrator (the principle of welfare) (Lacey, 1988). For instance, if the punishment imposed manages to address the underlying causes of criminality, then its imposition can be warranted since it will enhance the perpetrator's welfare. As Lacey (1988) points out, however, this attempt to enhance the perpetrators' welfare should respect individual autonomy and minimise punishment on paternalistic grounds. Despite the different interpretations given to the positive outcome, consequentialists agree that punishment should be inflicted only as a means of achieving an 'independent identifiable good' (Duff & Garland, 1994: 6).

2.3.1.1 Deterrence

The deterrent theories of punishment are based on the assumption that an individual is always motivated by his own personal benefits rather than the common good (Becarria, 1971). As members of society we give up part of our liberty in exchange for membership in the community. Some people, according to the deterrent approach to punishment, will seek to regain that part of the lost liberty while trying to preserve their membership (Becarria, 1971). For this reason, society should counterbalance individuals' desire to revoke the part of their liberty sacrificed with something else (Becarria, 1971). According to Beccaria's (1971) account, those who seek to revoke the part of their liberty by ignoring the commands of the criminal law should be punished. In this regard, punishment will act as a counterbalancing factor in deterring individuals from offending. Consequently, the infliction of punishment can be warranted if it can deter future offending (Benn, 1958). It is essential, however, that the level of punishment imposed should not 'exceed what is necessary for [the] protection of the deposit of public security' (Beccaria, 1971: 122).

Deterrent theorists approach punishment from three different perspectives: (i) general deterrence; (ii) specific deterrence; and (iii) educative deterrence. General deterrence operates at two levels, i.e. criminalisation and the imposition of punishment. General deterrence starts from the position that criminalisation and the possibility of punishment are sufficient to deter members of society from offending (Paternoster, 2010; Packer, 1968). As to the latter, it is believed that if potential offenders are made aware of the punishment imposed on those who have been found guilty for the commission of a similar offence as the one they are about to commit, they will then be deterred from

offending (Bentham, 2007). In order for general deterrence to be effective the public need to be aware that certain kinds of behaviour are proscribed by criminal law and of the punishment imposed on those who offend (Mabbott, 1971). In addition to this, it also presupposes that potential offenders are in a position to carefully consider the gravity of the potential punishment and regard the fruits of offending as a risk which is not worth taking (Robinson & Darley, 2004).

At first sight, general deterrence can be very effective especially when the maximum sentence for an offence is severe. As evidence suggests, however, what really deters individuals from committing an offence is not criminalisation and the gravity of the sanction available for an offence, but the likelihood of detection and prosecution (Halliday, French, & Goodwin, 2001; Chambliss, 1971). Consequently, criminalisation and the prospect of punishment have little if any impact on potential offenders (Doob & Webster, 2003). Thus, regardless of how severe the maximum sanction for a particular offence is, if a potential offender believes that the possibility of detection and prosecution is minimal, then it is unlikely to refrain from offending simply because the wrong he is about to commit constitutes a criminal offence (Doob & Webster, 2003).

Specific deterrence is based on the rationale that if someone has already been punished the whole experience will discourage re-offending (Paternoster, 2010). For an advocate of this approach, the consequences of punishment are so undesirable that convicted offenders will voluntarily refrain from any criminal activity in the future. Contrary to what advocates of specific deterrence believe, however, evidence suggests that one out of four offenders will re-offend within one year (Ministry of Justice, 2017). Moreover, another cause for concern is that specific deterrence appears to allow for the imposition of punishment which can be disproportionate to the blameworthiness of the wrong committed. For an advocate of specific deterrence, the imposition of a disproportionate sentence can be warranted since that is likely to further enhance the deterrent effect of the sanction imposed (Tyler, 2006; Walker, 1994).[21]

Finally, educative deterrence embraces the idea that punishment should communicate society's disapproval for the wrong committed. According to Andenaes (1971: 142), through this process 'public's moral code [will be strengthened] and thereby create conscious and unconscious inhibitions against committing crime'. Educative

[21] I will return to the issue of proportionality in sentencing in 2.3.2.

deterrence, therefore, is inextricably linked with the communicative function of the criminal law.[22] This theory is built on the assumption that there is a correlation between public sentiment and punishment (Keating et al, 2014). On this view, if the legislature decides to criminalise a specific wrong, then members of the community will perceive the commission of this offence as highly immoral (Bottoms, 2002). As a result, they will voluntarily choose not to offend.

At first sight, the deterrent theories of punishment are appealing since they appear capable to prevent future criminality. According to Robinson and Darley (2004), however, deterrent theorists neglect the possibility that potential offenders might be willing to take risks and engage in proscribed activities irrespective of the possibility of detection and punishment. Moreover, it should be borne in mind that under certain circumstances individuals are not able to take rational decisions especially in the context of non-premeditated offences (Robinson & Darley, 2004). An individual who is intoxicated, for instance, may not be able to fully comprehend the potential consequences of a violent attack on another person, such as the possible sanction imposed for an offence of this kind. Consequently, under certain circumstances criminalisation and the prospect of punishment can have minimal deterrent effect on potential perpetrators.

Accordingly, if the sanctions (which amount to criminal punishment) imposed on those who behaved in an anti-social manner aim to deter future criminality, local enforcement agents need to ensure that the perpetrators are capable of making rational and informed decisions about their future behaviour. To explain this further, consider the following hypothetical. Suppose that Andrew, who is an alcoholic, constantly uses threatening and abusive language towards his neighbours. It is evident in this case that the main cause of Andrew's behaviour is his alcohol addiction. Local enforcement agents believe that Andrew will be deterred from behaving in a similar manner in the future if restrictions akin to criminal punishment are imposed on him through the issue of an injunction (specific deterrence). Although these restrictions can be very beneficial for some people in terms of altering their future behaviour, in this case it seems unlikely for them to have any deterrent effect on Andrew due to his alcohol addiction.[23] Local enforcement agents need first to address Andrew's alcoholism rather than to resort to the

[22] See 2.1.
[23] This is of course true of all kinds of criminal punishment.

imposition of sanctions that aim at inflicting 'hard treatment'.[24] Failure to do so will severely undermine any attempt to justify the restrictions imposed on Andrew.

2.3.1.2 Incapacitation

Incapacitation is another forward-looking theory of punishment which starts from the premise that punishment is warranted when it aims at incapacitating high-risk individuals (Morris: 1994). As Morris (1994: 241) explains, the possibility of incapacitating 'the criminal before the crime is surely an alluring idea'. As Lawton LJ noted in *R v Sargeant (1974) 60 Cr. App. R. 74* (77-78), incapacitation is the only solution for offenders for whom 'neither deterrence nor rehabilitation works'. A repeat rapist, for instance, will be prevented from re-offending if he receives a lengthy custodial sentence simply because he will be in prison and he will be unable to commit any further offences of similar nature.

According to selective incapacitation, offenders who are most likely to re-offend must be incapacitated as a means of preventing future criminality (Halliday, French, & Goodwin, 2001). Based on that rationale if the state believes that a convicted rapist is likely to re-offend after he is released from prison, then it would be permissible to incapacitate him further in order to prevent him from re-offending (Morris, 1994). To illustrate how this can apply in practice, consider the following scenario. Suppose that Andrew who is 80 years old and Sam who is 20 years old have been found guilty of rape. In both instances, the victims were 20 years old and the rapes had been committed under exactly the same circumstances, no aggravating or mitigating factors apply in either case. This is the first criminal conviction for both. According to the Crown Prosecution Service's (CPS) sentencing guidelines for rape and sexual offences, the starting point for the sentencing court should be a custodial sentence of five years.[25]

For a proponent of selective incapacitation, the imposition of a significantly lengthier custodial sentence on Sam can be warranted due to his age since he possesses a higher risk of reoffending, although being as blameworthy as Andrew. In principle, if the consequentialist calculus adopted by those advocating in favour of incapacitation is accurate, we can then safely predict who is most likely to offend or re-offend. Evidence

[24] For a more elaborated discussion on the infliction of 'hard treatment' in the context of criminal punishment see 3.1.1.

[25] See CPS, *Prosecution Policy and Guidance: Rape and Sexual Offences Chapter 19: Sentencing*. Available from: http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/sentencing/ [Accessed 18th May 2017].

suggests, however, that even a tremendous rise in the prison population is unlikely to have any significant effect on crime rates (Halliday, French, & Goodwin, 2001). Instead, offenders who have been convicted of relatively minor offences can be transformed to career criminal due to affiliation with other offenders whilst being in prison (Halliday, French, & Goodwin, 2001).

A second variation of this theory of punishment is collective incapacitation (Keating et al, 2008). Collective incapacitation allows for the incapacitation of dangerous individuals who are regarded as potential offenders in order to prevent the commission of future crimes (Morris, 1994). As Morris (1994) explains, in order to assess the likelihood of offending or reoffending we can rely: (i) on one's previous conduct; (ii) how individuals with the same characteristics tend to behave; and (iii) through professional experience.

As von Hirsch (1971-1972: 735-736) rightly points out, an accurate assessment as to the future criminal behaviour of an individual is difficult to make because 'violence generally is not a quality which inheres in certain "dangerous" individuals: it is an occurrence which may erupt' under certain circumstances. Someone needs not be a dangerous individual to unlawfully inflict GBH on others. He simply might have done so whist being voluntarily intoxicated. Moreover, this calculus is vulnerable to the assessor's subjectivity and fails to take into consideration the possibility that the individual under scrutiny is a rational agent who can voluntarily decide not to offend (Morris, 1994).

Aside from any concerns raised as to the accuracy of this consequentialist calculus, advocates of this theory face a number of normative challenges as well. As von Hirsch (1971-1972) contends, punishment should only be imposed by determining the guilt of the accused rather than on predictions as to their future criminal behaviour. Strict adherence to the abovementioned consequentialist calculus appears to allow for the imposition of punishment in cases where the individual in question has committed no wrong, but poses a great risk of offending in the future. Here, an analogy can be drawn with the injunction. As discussed above, there is no need for someone's behaviour to actually cause 'harassment, alarm, or distress' to another in order for an injunction to be issued against them.[26] Rather, the court examining the application for the issue of an injunction needs *only* to be convinced on the balance of probabilities that the perpetrator's

[26] See 'Conceptualising anti-social behaviour under the current law'.

behaviour was *likely* to cause any of the above outcomes.[27] It is possible, therefore, for local enforcement agents to justify the imposition of certain restrictions on someone who has committed no wrong simply based on the perceived risk posed by this individual. In cases where the implementation of the injunction has resulted in the imposition of criminal punishment and the perpetrators in question have committed no wrong, local enforcement agents can be criticised for punishing the perpetrators based on the supposed level of risk they pose rather than on the blameworthiness of their behaviour. Furthermore, concerns can be raised about the accuracy of their assessment as well.

2.3.1.3 Rehabilitation

The rehabilitative approach to punishment is situated within the humanitarian approach to offending (Weihofen, 1971). According to Weihofen (1971: 255), this theory was a humanitarian response to the 'degrading physical conditions in prisons'. Unlike the deterrent theory of punishment, rehabilitation operates on the basis that an offender can change through moral edification and reform (Weihofen, 1971). This theory of punishment is based on the assumption that the inclination to engage in criminal activities 'is the product of antecedent causes' (Allen, 1959: 226).

Similar to the other consequentialist theories of punishment, rehabilitation cannot guarantee that the sanction imposed on the offender will be proportionate to the wrong committed. The principle of proportionality dictates that the sentence imposed should be commensurate to the seriousness of the wrong committed (von Hirsch, 1994). For a proponent of rehabilitation, the primary objective of punishment is to address the causes of criminality. Thus, the nature and severity of the sanction imposed on each individual is contingent upon the underlying causes of his offending behaviour. This of course means that each offender will require different treatment in order to rehabilitate (Weihofen, 1971). Inevitably this is going to result in the 'unequal treatment for offences in themselves alike' (Weihofen, 1971: 255). In addition to this, as Bottoms (1980: 1-3) contends, such an approach is objectionable due to the fact that punishment is based on 'extremely impressionistic evidence' rather than on the blameworthiness of the wrong committed.

Rehabilitation as an approach to punishment allows for the imposition of a disproportionate sentence and enables the sentencing court to treat similar cases

[27] Section 2(1)(a) of the 2014 Act.

differently. It should be noted, however, that under section 142 of the Criminal Justice Act 2003 rehabilitation is listed as one of the purposes that punishment should serve. This can be attributed to the fact that if rehabilitation is successful it has the potential to permanently address the underlying causes of criminality. Thus, if rehabilitation is applied correctly, it can lead to lower re-offending rates in the future and assist the offender's reintegration to society.

The above analysis of the rehabilitative approach to punishment is central to the purposes of this thesis since, according to the Home Office (2012), ASB often has a number of underlying causes, such as alcoholism. This was one of the main reasons for the introduction of positive obligations, e.g. the perpetrator can be ordered to attend drug-related treatment (Home Office, 2012). It is possible, therefore, for local enforcement agents to justify the imposition of sanctions akin to criminal punishment on the need to address the causes of the perpetrators' behaviour. Based on our earlier analysis of the rehabilitative approach to punishment, however, in order for the imposition of these punitive sanctions to be warranted, they need to be *necessary* and *proportionate* to the wrong committed.

### 2.3.2 The non-consequentialist approach

In contrast to consequentialists, the non-consequentialists are backwards looking theorists. A non-consequentialist focuses on the wrong committed, rather on what punishment can achieve in the future (Hawkings, 1971). For a non-consequentialist, the wrongdoer must get what he *deserves* for his past behaviour (Moore, 2010). Emphasis is placed, therefore, upon the notion of retribution (von Hirsch & Ashworth, 2005). Although retribution can be interpreted in various ways, for retributivists the wrongdoer should be treated as a rational agent who must be held accountable for his actions (Packer, 1968). An equally important concept for many retributivists is the communicative function of punishment (Marshall & Duff, 1998). As it will be discussed in more detail below, for many retributivists the punishment imposed on the offender should reflect the moral blameworthiness of the wrong committed.

Similar to the other theories discussed above, the close analysis of the non-consequentialist stance will enrich our theoretical understanding of punishment and assist us in our future evaluation of the injunction. In the remainder of 2.3, I will focus on the

'just deserts' approach to retribution which appears to be the most relevant non-consequentialist approach to punishment for the purposes of this thesis.

2.3.2.1 'Just deserts'

The 'just deserts' approach embraces the idea that through punishment the perpetrator must receive what he really *deserves* based on his past behaviour (Ashworth & Horder, 2013). This theory, according to Mundle (1971), comprises of three primary principles: (i) the moral offence; (ii) proportionality; and (iii) *desert*. Moral wrongdoing in this regard refers to the commission of a criminal wrong by a culpable individual (Ashworth & Horder, 2013). For an advocate of the *desert* theory, punishment should only be imposed on culpable wrongdoers. As to the principle of proportionality, in order for punishment to accurately reflect the moral blameworthiness of the wrong committed, we must ensure that the sanctions imposed on those who offend are 'proportionate in their severity to the gravity of offences' committed (von Hirsch, 1994). In contrast to the consequentialist theories of punishment, retributivism appears to dismiss outright the imposition of disproportionate and/or inconsistent sanctions. The last prerequisite is the need for punishment to be an appropriate desert.

This approach can be further divided into two sub-theories which interpret the notion of *desert* in different ways. According to the 'unfair advantage' interpretation of the 'just deserts', the commission of a criminal wrong gives to the perpetrator an unfair advantage over every law-abiding citizen (von Hirsch, 1994). This theory starts from the premise that compliance with the law benefits every member of society (von Hirsch, 1994). Accordingly, if someone chooses to offend then they gain an unfair advantage over the rest because they are still enjoying the fruits of others' compliance despite the fact that they broke the law (von Hirsch, 1994). Punishment can, therefore, be warranted on the basis that the offender through his suffering is repaying to society that unfair advantage received.

A key reservation about this conceptualisation of retribution relates to the gain of that unfair advantage. As von Hirsch (1994) maintains, the commission of certain crimes enables the perpetrator to obtain an 'unfair advantage' which can be accurately measured. This is not the case though with every single offence (von Hirsch, 1994). To explain his point further, von Hirsch (1994) uses the example of tax evasion which clearly benefits those who do not pay their fair share, but still benefit from the tax paid by other members

of the community. What is the advantage though obtained by someone who uses threatening and abusive language towards others whilst being drunk? Whilst calculating the benefit obtained through the commission of certain offences can be unproblematic, this might not be the case for other offences which do not produce any monetary benefit for the offender, such as unlawful manslaughter.

Another cause for concern with regard to the 'unfair advantage' approach relates to the extent of the punishment that should be imposed on each offender (von Hirsch, 1994). Further guidance and reasoning is needed with regard to how this unfair advantage is to be calculated and how a proportionate punishment is to be imposed (von Hirsch, 1994). The most challenging task for an advocate of this theory is to identify 'determinants of punishment exclusively in the offence itself' (Benn, 1958: 335). Without identifying those determinants someone will find it extremely hard to justify the nature and extent of punishment that must be imposed.

Notwithstanding the abovementioned criticisms, retributivism appears to provide a good basis upon which constraints can be placed on the ability of the state to inflict punishment upon us. The fact, for instance, that this approach utilises the principle of proportionality is likely, if adopted, to minimise disproportionate punishment and facilitate clarity, consistency and predictability in terms of sentencing. Retributivists are still faced with one very important challenge. In contrast with the forward-looking theories of punishment, especially deterrence and rehabilitation, retributivism is only concerned with what has happened in the past. Its endeavour is focused on delivering a deserved punishment to the wrongdoer. This is unlikely, however, to address the underlying causes of criminality and facilitate the offenders' reintegration to society.

Similar to criminality, ASB often has deeper causes, such as alcohol or drug addictions, which need to be addressed (Home Office, 2014). The imposition of restrictions which simply aim to deliver a deserved punishment cannot always adequately address these underlying causes. Restrictions of this nature might provide temporary relief to those affected by the perpetrator's behaviour, but these cannot have a permanent effect.[28] Consequently, if there is evidence to suggest that the implementation of the injunction's first limb has resulted in the imposition of sanctions akin to criminal punishment on purely retributivist grounds without attempting to address the underlying

[28] See 4.1.2.

causes of ASB, we can then express our reservations about the legitimacy of the punishment imposed on those people.

The second variation to the 'just deserts' relates to the need for punishment to communicate censure. This latter approach departs from the premise that what distinguishes punishment from other legal sanctions is its expressive function (Feinberg, 1965). For the advocates of this theory, punishment does not simply impose restrictions on our liberty, but it 'conveys censure' as well (von Hirsch & Ashworth, 2005: 17). Punishment extends beyond the material consequences, since, according to Feinberg (1965), it has a symbolic function. To punish someone is to express society's disapproval for the wrong committed (Feinberg, 1965). As von Hirsch and Ashworth (2005) assert, the expression of this disapproval is an invitation to the wrongdoer to problematise about their behaviour and to acknowledge the blameworthiness of the wrong committed. It follows that for an advocate of this theory, punishment can be justified if its underlying rationale is to censure both the wrongdoer and the wrong committed.

This is the main reason why the 'just deserts' approach requires that the level of 'hard treatment' imposed on the perpetrator should reflect the stringency of his blameworthiness (von Hirsch, 1993); the higher the blame the more severe the 'hard treatment' should be. As Foucault (1977) explained, the imposition of 'hard treatment' was traditionally associated and structured based on the blameworthiness of the wrong committed. Based on his account, in the 18th and 19th century public executions and tortures were designed to reflect 'the nature of the crime: the tongues of blasphemers [for example] were pierced' (Foucault, 1977: 44-45).

Although the censure approach to 'just deserts' seems grounded especially in light of our earlier discussion about criminal law's distinctiveness,[29] its success is contingent upon maintaining the normative distinction between the criminal law and other methods of social regulation deployed by the state. The extensive use of non-criminal legislation, such as the injunction and the TPIMs, which can potentially lead to the imposition of criminal punishment, blurs the dividing line between the criminal and the civil law (Coffee, 1992). Criminalisation and punishment can only communicate censure if there is an unequivocal distinction between the criminal law and every other form of regulation. On this view, if functions of criminal law, such as dealing with the most serious moral

[29] See 2.1.

wrongs, are taken by other form of regulation, then society will not be able to comprehend the moral value of the messages communicated through criminalisation. As a result of this, members of the public will see no difference between wrongs proscribed by criminal law and wrongs dealt with by civil law, such as breach of a contract.

Similarly, if non-criminal methods of regulation, such as the injunction, are used by the state to publically condemn those whose behaviour is regarded as immoral, then the criminal law's distinctiveness will be undermined. Consequently, if there is evidence to suggest that local enforcement agents sought to publically condemn those who behaved in an anti-social manner, then the implementation of the injunction can hardly be justified since it undermines the theoretical distinction between the criminal law and the civil preventive measures.

### 2.4 Further reflections on criminalisation and punishment

This chapter has critically engaged with some of the most prominent and influential theories of criminal law and punishment. The main objective of this analysis was twofold. First, it aimed at highlighting criminal law's distinctiveness and why the classification between criminal and non-criminal rules matters. Secondly, the close analysis of these normative accounts aimed at laying the foundations for the theoretical evaluation of those instances where the implementation of the injunction's first limb resulted in the indirect criminalisation of certain kinds of ASB. Although the analysis of these theories is central to the purposes of this thesis, the legitimacy of criminal rules also depends on a number of other rules and principles which are not necessarily associated with specific offences, but relate to the overall structure of the criminal law. Consequently, if the injunction is operating as a *de facto* criminal rule, then it not only needs to be examined in light of the theories of criminalisation and punishment examined above, but should also be evaluated with reference to the principles underpinning the criminal law.

These principles include, but are not limited to the enhanced procedural protections afforded to those facing criminal prosecution. One of the basic principles underpinning the criminal law, for instance, is that no one should be punished if his behaviour was not at the time a criminal offence, i.e. the principle against retroactive criminalisation. This principle is enshrined under Article 7(1) of the ECHR and its aim is not simply to prevent the introduction of criminal rules which will have a retrospective effect, but also to ensure that the application of existing rules by courts does not result in

the imposition of punishment for conduct which at the time was not proscribed by criminal law (Ashworth & Horder, 2013). The importance of this principle lies with the need to ensure that 'a person ought not to be punished in the name of a political community unless it can confidently be said that the community officially regards his conduct as warranting the criminal punishment at issue' (Westen, 2007: 230). Seen in this way, a duty is imposed on courts to interpret and apply criminal rules in line with the legislature's objectives, rather than extending the scope of the law beyond what was originally intended for by the Parliament. For Westen (2007), in cases where it is unclear whether the behaviour of the accused falls within the scope of the offence charged with, then the accused should be acquitted in order to prevent the retroactive criminalisation of the behaviour in question.

Retroactive criminalisation is not simply about which body (the Parliament or the courts) should determine the proper scope of criminal rules. Rather, the principle against retroactive criminalisation should be examined bearing in mind its potential broader societal implications. The criminal law should not be seen as a mere mechanism of regulation. Instead, it should be viewed as a mechanism of edification through which members of the community are informed about society's core values.[30] The criminal law should allow people to decide for themselves whether they want to undermine society's core values. It should let people know in advance that certain wrongs are criminal and those who are convicted of these wrongs will be publically condemned. This will provide people with an opportunity to plan their future behaviour accordingly without being unsure as to whether they might be in breach of a criminal rule (Gardner, 2008). This requires criminal rules to be easily accessible by the public, with clear and identifiable limits ensuring that a 'fair warning' is given to people about the kinds of behaviour criminalised (Robinson, 2005). Clearly, a certain degree of flexibility is necessary in order to ensure that the criminal law 'keep[s] pace with changing circumstances'.[31] As Robinson (2005: 340) explains, however, providing a 'fair warning [is] a quality of special importance in criminal law, where a defendant's life and liberty are often at stake'.

Based on the above analysis of the principle against retroactive criminalisation, what can be problematic about the injunction's first limb is that its implementation can result in the criminalisation of behaviour which at the time was not proscribed under the

[30] See 2.1.
[31] Kokkinakis v Greece (1994) 17 EHRR 397 at para. 40.

criminal law. Apart from the fact that punishment would have been imposed in the absence of the enhanced procedural protections, what is also problematic about this is that certain kinds of behaviour have been criminalised without informing the rest of the polity that the perpetrators' conduct was in fact treated as a crime. Thus, no 'fair warning' is given to the rest of the polity that behaving in a manner that is likely to cause 'harassment, alarm or distress' or that it is capable of causing 'nuisance and annoyance' can potentially result in the indirect imposition of criminal punishment. Using of course the injunction as a means of addressing behaviour which is already proscribed by criminal law undermines the moral distinction between criminal and civil rules, it constitutes *under-criminalisation.*[32]

The purpose of the above discussion has been to re-emphasise the need for a holistic examination and analysis of the implementation of the injunction by local enforcement agents. If there is empirical evidence to suggest that the injunction has been operating as a *de facto* criminal rule, it must then be subjected to the same scrutiny as criminal rules. As part of our theoretical evaluation, for instance, we need to investigate the clarity of the relevant legislation and whether a 'fair warning' has been given to the community about the behaviour criminalised. Based on our earlier theoretical analysis of the law relating to ASB, it seems extremely difficult for the relevant statutory provisions to survive close scrutiny primarily due to their ambiguous scope.[33] This reinforces further the need to examine empirically the implementation of the injunction's first limb and investigate whether this has resulted in the *indirect* criminalisation of certain kinds of behaviour.

**Conclusion**

As with every political decision, criminalisation is a complex process which involves many conflicting interests and considerations (Stuntz, 2001-2002; Stoker, 2006). As Lacey (2004) points out, one of the most important factors taken into consideration by the legislature is the influence exerted by various pressure groups and strong public opinion regarding criminalisation. As Well and Quick (2010: 28) maintain, members of the parliament are 'ultimately accountable to the populace and are therefore liable to be influenced by what they think are prevailing opinions'. Public deliberation regarding criminalisation and any other important decision that can influence society as a whole is

[32] See 'The pre-2014 approach to anti-social behaviour'.
[33] See 'Conceptualising anti-social behaviour under the current law'.

an inherent characteristic of a democratic society (Stoker, 2006). The impact of this public deliberation, however, must be approached with caution. As Garland (2001) contends, politicians tend to calculate the potential appeal of their actions before planning their strategies. Penal populism is a worrisome phenomenon since in an attempt to avoid any 'signs of weaknesses' politicians tend to adopt more punitive measures, such as severer sentences, which can sometimes contradict with penal expertise (Garland, 2001: 111-112).[34] Similarly, politicians tend to 'tapping into and using for their own purposes, what they believe to be the public's generally punitive stance' (Bottoms, 1995: 40). It is due to the effects of penal populism that the state is unable 'to create and maintain rational criminal law policy' (Brown, 2007: 2).

The importance of maintaining a principled and coherent criminal law policy lies not only with the need to enable people to plan their behaviour safely without fearing that they might be in breach of a criminal rule (i.e. a rule labelled by the legislature as criminal in nature), but it also lies with the need to preserve criminal law's distinctiveness. This can only be achieved if the criminal law remains dissimilar to other methods of regulation both in terms of the behaviour proscribed and in terms of its response to those who violate its rules (Husak, 2004).

The potential adverse consequences of penal populism further reinforce the need to look beyond the official classification of the injunction and examine whether its implementation has resulted in the indirect criminalisation of certain kinds of behaviour. As noted earlier, if there is empirical evidence to suggest that the injunction's first limb has been operating as a *de facto* criminal rule, we should then reflect back on our theoretical analysis of the theories of criminal law and punishment (and any other general rules and principles underpinning criminalisation) and subject this measure to the same scrutiny as criminal rules. To reach to this point, however, it is necessary to identify a single viable test through which we can determine whether a given legal rule should be regarded as criminal regardless of the label attached to it by the legislature. As explained in more detail in chapter 3, courts have formulated such a test (i.e. the anti-subversion doctrine), but this test was found to be problematic in a number of respects (e.g. it appears to be circular in application), which necessitated the formulation of a new working definition of criminalisation.

[34] For more on penal populism see 4.2.1.

# Chapter 3: Conceptualising criminalisation

Examining whether the implementation of a given rule constitutes a form of criminalisation pre-supposes a clear understanding of what it is to criminalise. This could be reduced to a simple examination of how the rule in question was classified by the legislature, i.e. either criminal or non-criminal. On this view, to criminalise is to label a particular kind of behaviour as a criminal wrong (i.e. direct criminalisation). Although this rationale appears to be theoretically plausible, it fails to take into consideration the possibility of *indirect* criminalisation. The importance of this omission lies with recent legislative developments, such as the introduction of the civil preventive measures, which, in theory, appear to allow for the imposition of sanctions akin to criminal punishment without the need to resort to direct criminalisation.

This chapter is structured in three parts. The first part investigates the way criminalisation has been conceptualised in academic discourse and explores how courts have applied rules which were susceptible to indirect criminalisation. The main objective of this analysis is to examine whether these accounts can provide us with a test for distinguishing criminal from non-criminal rules. Through the close analysis of these accounts, certain problems and inconsistencies are identified which necessitate the formulation of a working definition of criminalisation. In part two, a working definition of criminalisation is formulated. The working definition formulated below does not constitute a complete departure from the accounts of criminalisation examined in the first part of this chapter. Rather, it utilises these accounts and seeks to overcome some of the concerns and problems encountered by them. This working definition enables us to determine whether a legal rule constitutes a form of criminalisation irrespective of the label attached to it (the second research question of this thesis). The chapter concludes with an evaluation of this working definition of criminalisation by scrutinising its main limitations and advantages.

## 3.1 Conceptualising criminalisation: The existing approaches

In order to be able to identify (and then possibly address) instances of indirect criminalisation, it is essential to pre-determine under what circumstances a legal rule should be regarded as criminal. The importance of this task lies with the very nature of indirect criminalisation. In contrast to direct criminalisation, indirect criminalisation

formally lies outside the contours of the criminal law. Our examination, therefore, should also be extended to rules which are labelled as non-criminal but are susceptible to indirect criminalisation. Central to this thesis is the need to examine whether the injunction's first limb (which formally lies outside the criminal law) has been implemented in a manner that resulted in the indirect criminalisation of certain kinds of behaviour. To achieve this, a test is needed through which we will be able to look beyond the official classification of legal rules and examine whether they should be regarded as criminal or non-criminal.

At first sight, the need for a working definition of criminalisation can be questioned for two reasons. First, there is already a well-established understanding of criminalisation in the academic literature. [1] Many prominent criminal law theorists agree that what really distinguishes criminalisation from other forms of regulation is the imposition of criminal punishment. These theorists have also provided a very compelling account of criminal punishment. Secondly, as revealed below, courts have already dealt with legal rules which were labelled as non-criminal and were susceptible to indirect criminalisation. In *McCann*, for instance, the House of Lords scrutinised the ASBO's first limb and concluded that it should be regarded as a civil order.[2] Thus, courts have already formulated their own test through which they sought to examine whether a particular legal rule should be regarded as criminal or non-criminal.

Before elaborating on my working definition of criminalisation, therefore, it is important to illustrate why a new test is needed bearing in mind the presence of these pre-existing accounts both in the academic literature and in case law. To illustrate this, it is necessary to engage further with these pre-existing accounts and elaborate on what is problematic about them. It has to be noted from the outset that the working definition of criminalisation formulated below is not a completely new account. Instead, it was built upon these existing approaches' (both in the academic literature and in the case law) inconsistencies and problems. The main objective of this endeavour is to identify and articulate a single viable test can be applied to all non-criminal rules.

[1] See 2.1.
[2] See 'The pre-2014 approach to anti-social behaviour'.

3.1.1 The current academic literature

As mentioned in 2.1, for many leading criminal law theorists, such as Feinberg (1965) and Husak (2008b), criminalisation must be associated with punishment.[3] According to them, what distinguishes a criminal rule from other forms of regulation is that the former punishes those who offend whereas the latter imposes mere penalties (Feinberg, 1965; Husak 2008b). Based on their formulation of punishment, sanctions imposed by the criminal law comprise of two main features both of which must be present in order for them to amount to criminal punishment: (i) they impose 'hard treatment'; and (ii) they intentionally convey censure.

The pressing question is whether the above formulation of criminal punishment can assist us to address the second research question, i.e. 'how can we identify when conduct has been criminalised?' Clearly, what Feinberg and Husak intended through the abovementioned account of criminalisation was to highlight the distinctiveness of certain paradigmatic offences, such as the unlawful infliction of GBH, when compared to other kinds of wrongs, e.g. breach of contract. Their formulation of criminalisation though faces two main challenges when used as a test for distinguishing criminal from non-criminal rules. First, 'hard treatment' (akin to the one imposed for those found guilty of an offence) can also be imposed through a number of non-criminal measures, such as the restrictions imposed on those against whom TPIMs are used.[4] Secondly, censure (which for both Feinberg and Husak is the most defining characteristic of criminal punishment) is tied exclusively to the criminal label, i.e. to label a particular kind of behaviour as a criminal wrong is to publically and intentionally condemn it. It is possible though that censure (public condemnation) can be communicated outside of the criminal law as well. Consequently, the above formulation of punishment fails to take into consideration legal rules which formally lay outside the ambit of the criminal law, but are susceptible to indirect criminalisation. It is, therefore, imperative to formulate a more fine-grained model which will enable us to look beyond the label attached to each legal rule and examine whether its implementation has resulted in the indirect criminalisation of certain kinds of behaviour.

[3] For an alternative approach see Tadro's (2010) account based on which the main objective of criminalisation should be deterrence rather than censuring.
[4] I elaborate further on these restrictions below.

This need for a more fine-grained model is particularly evidenced by the introduction and rise of the civil preventive measures, such as the injunction and the TPIMs, which appear to undermine the normative distinction between criminal punishment and mere penalties. As Coffee (1992: 1875) explains, 'the line between civil and criminal penalties is rapidly collapsing' rendering the separation between the two almost impossible. Mann (1991-1992) contends that based on the current state of the criminal law there is no real difference between the nature of the sanctions imposed by the criminal law and the sanctions imposed by the civil law. For Mann (1991-1992), this can be attributed to the introduction of 'punitive civil sanctions' which form the middleground between the criminal and the civil law. 'Punitive civil sanctions' were defined as those sanctions which are able to punish the 'offender' through the civil procedure (Mann, 1991-1992: 1799). As Mann explains (1991-1992: 1799), legal rules which allow for the imposition of 'punitive civil sanctions' form a 'hybrid jurisprudence' which is very similar to the ASBO discussed earlier.[5]

In order to examine whether the sanctions imposed by civil preventive measures constitute indeed a form of criminal punishment, it is necessary to look beyond the label attached to them and examine their implementation. To illustrate this, let us consider in more detail how the TPIMs operate. Section 3(1) of the Terrorism Prevention and Investigation Measures Act 2011 (2011 Act) allows for the imposition of severe restrictions on an individual's liberty in cases where 'the Secretary of State is satisfied on the balance of probabilities that the individual is, or has been, involved in terrorism-related activity'. [6] If the Secretary of State deems the imposition of certain restrictions as *necessary* for the prevention of any terrorist activities, then these can be imposed on that individual. [7] These restrictions can include amongst others overnight curfews, travel bans and restrictions on movement.[8] Though the main objective of these measures is the prevention of terrorism, it is evident from the above that the TPIMs allow for the imposition of severe restrictions on an individual's liberty (akin to 'hard treatment') through non-criminal legislation. Although breach of the restrictions imposed constitutes an offence under section 23 of the 2011 Act, there is no need for an offence to be committed in order for these restrictions to be imposed in the first place. Similar to the

[5] See 'The pre-2014 approach to anti-social behaviour'.
[6] I will deconstruct the concept of liberty in 3.2.1.
[7] Section 3(3).
[8] For a complete account of these restrictions see Schedule 1 of the 2011 Act.

injunction's first limb, our main focus here is the imposition of these restrictions rather their possible breach.

What is also important about the potential restrictions that can be imposed through the implementation of the TPIMs, is that these are imposed in the absence of the enhanced procedural protections. In cases, for instance, where the threat of a terrorist attack is imminent, there is no need for a court permission in order for the Secretary of State to make use of these measures.[9] Where a prior permission by court is needed, it is evident from the wording of section 6(3) and section 6(4) that the enhanced procedural protections do not apply. The court examining the imposition of these restrictions, for example, need only be satisfied that the Secretary of State's decision to use these measures is not 'obviously flawed' in order to grant its permission for the imposition of these restrictions on an individual.[10]

To illustrate further why the above formulation of criminalisation advanced by Feinberg and Husak is problematic, consider the following hypotheticals. **A**, Sam, a suspected terrorist, has been found in possession of a military knife outside a night club. Sam has been convicted under section 57(1) of the Terrorism Act 2000 and sentenced to one year imprisonment. **B**, there has been intelligence to suggest that Andrew, who has committed no offence yet, has close ties with a number of suspected terrorists who are planning an imminent terrorist attack. The Secretary of State 'is satisfied, on the balance of probabilities' that Andrew is also involved in this terrorist attack and decides that a number of restrictions should be imposed on Andrew under Schedule 1 of the 2011 Act, such an overnight home curfew, in order to prevent the attack. The restrictions imposed on Andrew last for one year.[11]

The pressing question here is whether the sanctions imposed on Sam and Andrew amount to criminal punishment. Based upon Feinberg and Huska's formulation of criminal punishment, the custodial sentence imposed on Sam clearly satisfies both prerequisites of punishment, i.e. 'hard treatment' (one year imprisonment) and censure (section 57(1) constitutes an offence). As far as the restrictions imposed on Andrew are concerned, although the imposition of a home curfew can be regarded as a form of 'hard treatment', this cannot amount to criminal punishment because censure is tied exclusively

[9] Section 3(5)(a).
[10] Section 6(3).
[11] Section 5(1)(b).

to the criminal label. The TPIMs are regarded as civil preventive measures the purpose of which is to protect 'members of the public from a risk of terrorism, for terrorism prevention' and to assist the investigation of terrorism-related incidents.[12] Seen in this way, the legislature's intention was not for the TPIMs to publically condemn suspected terrorists. Consequently, the restrictions imposed on Andrew cannot amount to criminal punishment despite their severity simply because of the label attached to the TPIMs. This is neither to suggest that every measure imposed through the TPIMs amounts to punishment nor that the imposition of these restrictions on Andrew cannot be warranted. Rather, is to point out that we should not tie censure exclusively to the criminal label. Instead, we should look beyond the official classification of each rule and explore whether its implementation allows for the imposition of punishment.

The way criminal punishment has been conceptualised in academic literature, therefore, fails to take into consideration the possibility of *indirect* criminalisation. What if, for example, the implementation of TPIMs leads to the imposition of severe restrictions on Andrew's liberty whilst state actors, such as the police, *publically* and *purposefully* condemn both Andrew (e.g. Andrew being purposefully stigmatised by state actors as a terrorist sympathiser or aider) and his behaviour? This is not to undermine the validity of the arguments raised by criminal law theorists regarding the punishment-penalty distinction. Rather, it is to point out the need for an alternative test which will enable us to determine under what circumstances supposedly non-criminal sanctions amount to criminal punishment.

The importance of being able to identify instances of *indirect* criminalisation lies beyond the need of ensuring the 'fair labelling' of legal rules.[13] Instead, this has broader and much more important implications for the 'rule of law' and the way the state chooses to regulate our behaviour. Based on Raz's (2009) formulation of the 'rule of law', the law should not just be predictable, but it has to be unequivocal and stable as well. The importance of this lies with the need for our legal system to develop in a coherent and principled manner allowing the public to safely predict whether their future behaviour is likely to result in the imposition of punishment.

[12] Section 3(3).
[13] For more on 'fair labelling' see Chalmers and Leverick (2008).

The above criticisms regarding the way some of the most prominent legal theorists have conceptualised criminalisation should not be regarded as an invitation to disregard the official classification of legal rules. Rather, it is to suggest that the legislature's intentions should not distract us from our main objective, which is to examine whether the implementation of a given legal rule constitutes a form of criminalisation regardless of the label attached to it. As Ashworth and Zedner (2015: 16) put it, 'the key question [to be addressed here] is whether the measure is punitive: it may also be preventive in its purpose, but the classification depends on whether it is punitive in substance'. If there is evidence to suggest that the legal rule under scrutiny has resulted in the indirect criminalisation of certain kinds of behaviour, we can then refer back to the legislature's original intentions in order to assess the legitimacy of this rule.

### 3.1.2 Moving beyond direct criminalisation

Thus far, it has been argued that the way we conceptualise criminalisation should take into consideration both instances of *direct* and *indirect* criminalisation. This will enable us to look beyond the official classification of legal rules and investigate if punishment has been imposed indirectly through non-criminal legislation. In *Engel*, the ECtHR attempted to formulate a mechanism for distinguishing criminal from non-criminal rules based on the nature of the sanctions imposed rather than on the label of the rule in question. This test also raises a number of concerns and is in need of modification if it is to survive close scrutiny.

In *Engel*, the ECtHR had to determine whether sanctions imposed on members of the Dutch armed forces through disciplinary proceedings should have been regarded as criminal in nature and thus trigger the Article 6 enhanced procedural protections (para.79). The applicants argued that they were entitled to the same procedural safeguards as those charged with a criminal offence (para.79), because 'the disciplinary penalty or penalties, measure or measures pronounced against them contravened Article 5(1)' (para.56), i.e. the right to liberty and security. The ECtHR acknowledged that 'the Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law' (para.81). It was held, however, that Article 6(3) can still be applicable nothwistanding the label attached by domestic legislation to a legal rule if it 'counts as "criminal" within the meaning of Article 6' (para.82-83).

In order to determine whether these disciplinary proceedings against the applicants were criminal in nature, the ECtHR devised a three-stage test known as the anti-subversion doctrine (para.72). The test is as follows:

(i) 'It is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State to criminal law, disciplinary law or both concurrently ….
(ii) The very nature of the offence … [and]
(iii)The seriousness of what is at stake' (para.81-82).

The introduction of this test was deemed necessary in order to prevent states from classifying legal rules as non-criminal simply as a means of circumventing the extra layers of protection guaranteed by the Convention to those facing a criminal trial (Ashworth & Horder, 2013). To illustrate how the anti-subversion doctrine operates in practice, let us consider the following hypothetical. Suppose that one of the contracting states to the ECHR decides to re-label its entire penal code as a civil set of wrongs without changing the substance of any of the rules in question as a means of circumventing the Convention. Although all of the offences included in that state's penal code are now labelled as civil rules, the anti-subversion doctrine enables, in theory, courts to determine whether each legal rule should be regarded as criminal regardless of its new label.

Based on the anti-subversion doctrine, our starting point in this process should be the classification made by domestic legislation, i.e. whether the legislature classified this as a criminal or a non-criminal rule (para.81-82). The domestic classification should provide us with an indication as to the intentions of the legislature. The second step is to examine the nature of the offence committed by that individual (para.82). In *Engel*, the fact that the applicants were members of the armed forces and the offences committed were inextricably linked with their occupation meant that the classification of the offence at stake as disciplinary rather than as criminal could be warranted (para.82). Thirdly, according to this test, one should assess 'the degree of severity of the penalty that the person concerned risks incurring' (para.82). The ECtHR held that if the sanction imposed is so severe that it amounts to a deprivation of someone's liberty under Article 5 of the Convention, then it should be regarded as a form of criminal punishment (para.82). According to the ECtHR, 'in a society subscribing to the rule of law, [sanctions of this severity] belong to the "criminal" sphere (para.82).

Before analysing in more depth this three-part test, it is imperative to examine how terms like 'liberty' and 'deprivation' have been conceptualised by the ECtHR. Based on *Engel*, liberty in this context should be given its classic meaning and interpreted as 'the physical liberty of the person' excluding any 'mere restrictions upon liberty of movement' (para.58). This approach is in harmony with the interpretation given to liberty by both Article 5 and Article 2 of Protocol No. 4 of the Convention which make reference to individuals' right to move freely within the contracting states' jurisdiction.

In determining whether the sanction imposed amounts to a deprivation of someone's liberty, the ECtHR held that 'account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question' (para.59). In *Engel*, the court focused on the severity of the sanctions imposed on the applicants, i.e. the number of days they had to spend under arrest (para.61-64). For the ECtHR, only in those cases where individuals were actually locked in a cell and were completely deprived of their freedom of movement would that amount to a deprivation of their liberty under Article 5, i.e. they must have been 'kept under lock and key' (para.61-64).

At first sight, the three-part test introduced by the ECtHR in *Engel* seems a positive development, especially in cases where severe restrictions on an individual's liberty have been imposed in the absence of the enhanced procedural protections guaranteed under Article 6. Although the anti-subversion doctrine provides a good starting point for a more holistic approach to criminalisation, two key reservations can be expressed about the test formulated by the ECtHR.

First, according to *Engel*, it is essential to pay attention to the legislature's original intentions with regard to the legal rule under scrutiny, i.e. the first limb of the test (para.81-82). If the expressed intention of the legislature was not to punish those who violate this legal rule, then this should be an indication against criminalisation (para.81-82). This is an explicit acknowledgement by the ECtHR that the national legislature is in a better position to determine how domestic legislation should be labelled.

In effect, however, reliance on the legislature's original intentions can be problematic since it provides national legislatures with a significant leeway through which they can manage to circumvent the anti-subversion doctrine. To elucidate how this can work in practice, let us re-examine the TPIMs in light of the *Engel* test. As noted

above, through the TPIMs significant restrictions can be imposed on suspected terrorists, even though they have committed no offence.[14] As the wording of the 2011 Act suggests, the main objective of these measures is to prevent terrorism-related activities. If we were to strictly apply the first limb of the *Engel* test, then we would have dismissed outright the possibility of regarding the TPIMs as a criminal rule because the legislature's intention was to introduce a civil preventive measure rather than to punish suspected terrorists. Consequently, the first limb of the test can encourage states to label legislation as non-criminal in the name of prevention, even though, in theory, it seems possible for the rule in question to be implemented in a manner that results in the indirect criminalisation of certain kinds of behaviour. As King (2014: 382) explains, however, labelling a specific legal rule either as civil or preventive 'does not [necessarily] relieve proceedings of their criminal nature'.[15] In order to examine, therefore, the true nature of the legal rule in question we need to look beyond the label attached by the legislature and 'concentrate on the realities of the situation' (*Ezeh and Connors v United Kingdom (2004) 39 EHRR 1*: para 16).[16] As the ECtHR rightly pointed out in *Ezeh*, the official classification made by the legislature has 'only a formal and relative value' (para. 9).

Although in both *Engel* and *Ezeh* (para. 16) the need 'to look beyond appearances and the language used' was highlighted, it is evident through a line of cases that the

[14] See 3.1.1.

[15] King (2014) is critical here of the approach adopted by the ECtHR in *Air Canada v UK [1995] 20 EHRR 150* which in effect mirrored the first-limb of the anti-subversion doctrine. In this case, the ECtHR had to determine, *inter alia*, whether section 141(1) of the Customs and Excise Management Act 1979 (by virtue of which the applicant's property was seized) constituted a criminal offence and thus triggered the Article 6 protections (e.g. the presumption of innocence) (164). In determining the nature of section 141, the ECtHR paid particular emphasis upon the legislature's intention, which according to the Strasbourg court, was not the imposition of a penalty (164-165). Rather, according to the majority, the £50 000 payment made by the applicant for the return of its property should 'be seen as a measure limiting the harm caused' to them (164-165). As Judge Trechsel (dissenting) rightly pointed out, however, when determining the nature of a particular provision we should look 'behind appearances … [and investigate] what [has] actually happened in the present case' (166).

[16] This case involved disciplinary proceedings against the applicants who were already serving a custodial sentence. As a result of these disciplinary proceedings, additional days of custody were imposed on both applicants. The applicants claimed that these proceedings were criminal in nature and thus denial of legal representation constituted a violation of their rights under Article 6(3)(c) of the Convention. In determining the true nature of these disciplinary proceedings, the Grand Chambers of the ECtHR held that in order for the Article 6 protections to be triggered, the 'offence [in question must] made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere' (para. 86). In this case, the Grand Chambers of the ECtHR, indeed, looked beyond the stated objectives of these disciplinary proceedings noting that prevention and punishment 'are not mutually exclusive' (para. 105). On this view, since one the purposes of the sanctions imposed was to punish the applicants, then the disciplinary proceedings against them should be regarded as criminal for the purposes of the Convention.

ECtHR on many occasions was in fact reluctant to do so.[17] This reluctance of the ECtHR to actually look beyond the official label attached by domestic legislation is particularly evident in cases involving civil forfeiture.[18] One of the most illustrative examples of this, is the case of *M*. In *M*, the applicant had a number of previous convictions including 'membership of an organisation of the mafia type …, lending money at an extortionate rate, obtaining money with menaces and demanding money with menaces' (82-83). The Italian authorities managed to obtain a compulsory residence order as well as a confiscation order against him on the basis that his vast fortune 'could only have been accumulated from the proceeds of [his] unlawful activities' (84). According to the domestic legislation in question, it was sufficient for the Italian authorities to establish a *prima facie* case regarding the unlawful origins of the applicant's assets. Simply put, there was no need for the authority applying for the issue of a confiscation order to prove beyond any reasonable doubt that M's assets were in fact the product of his criminal activities.[19] This was due to the nature of the relevant legislation which, according to the Italian government, was to prevent dangerous individuals from committing crimes, rather than to punish them for their past behaviour. If a *prima facie* case was established against an individual's assets, then he/she had to provide an explanation for his/her assets.

For the appellant, the confiscation of his property constituted a form of criminal punishment and thus violated his rights under both Article 6(2) (i.e. the presumption of innocence) and Article 7(1) (i.e. prohibition against retrospective punishment). For the respondent, there was no violation of the Convention since these rights only apply to criminal offences and do not extent to preventive interventions. Similar to the approach taken in *Engel*, in determining the true nature of the legal rule at stake, the ECtHR focused on what the legislature aimed at through the introduction of this legal provision and how domestic courts dealt with measures of this kind before. Since, according to the Strasbourg court, 'proceedings on an application for a preventive measure are autonomous in relation to criminal proceedings and do not involve a finding of guilt',

[17] In effect, this created certain anomalies (see. for instance, my analysis of *M v Italy 12386/86* and *Ezeh* below) and ambiguities which enabled domestic courts to turn a blind eye (at least in certain cases) to the realities of the situation. This was particularly evident in cases such as *McCann*. As Bakalis (2003: 584) maintains, 'the House of Lords [in this case] … was rather selective in the parts of the Strasbourg judgments it chose to apply' choosing to neglect or dismiss cases, such as *Lauko v Slovakia (1998) 33 EHRR 9*, where the ECtHR in fact focused on the actual impact of the sanctions/restrictions imposed on those subjected to legal rules which were susceptible of indirect criminalisation.

[18] For a more comprehensive analysis of these cases see King, 2014.

[19] As far as M is concerned, there was 'a substantial body of circumstantial evidence' against the unlawful origins of his assets (83).

then a confiscation order against the applicant 'does not imply a finding that he was guilty of a specific offence' (97-98).

Depriving criminals of their unlawfully obtained assets is a defensible objective for the state to pursue since this does not only prevent future criminality, but it also communicates a message to society that there is a significant 'likelihood of detection/conviction' (King, 2014: 374). As Loader (2008) rightly points out though, as a society we should not only be concerned with what kinds of behaviour we regulated, but we should also be mindful of how we do so. Although the primary objective of the confiscation order issued against M might have indeed been the prevention of future crime, we cannot simply overlook the realities of the situation. In this case, the appellant was not only deprived of most of his property, but he was also labelled (at least indirectly) by the Italian authorities as a criminal whose behaviour is worth of reprobation. It follows that regardless of the legislature's objectives, preventive measures such as the confiscation order imposed on M, might result in the imposition of sanctions akin to criminal punishment. This was also acknowledged by Lord Bingham in the case of *Secretary of State for the Home Department v MB [2007] UKHL 46* where he stated that preventing interventions can be equally restrictive as criminal offences.[20] In his words 'this distinction [between preventive and criminal interventions] is not watertight, since prevention is one of the recognised aims and consequences of punishment and the effect of a preventative measure may be so adverse as to be penal in its effects if not in its intention' (para. 23).[21] Hence, if we are truly determined to investigate the actual nature of the law in question, it is imperative to look beyond its stated objectives and focus on its impact on those subjected to it.

[20] In this case the House of Lords had to determine, *inter alia*, whether a non-derogating control order issued under section 2 and section 3(1)(a) of the Prevention of Terrorism Act 2005, 'constituted a criminal charge for the purposes of Article 6' (para. 3). Similar to the approach adopted in *McCann*, the House of Lords (relying on the *Engel* test) held that these non-derogating control orders were civil in nature since they 'do not involve the determination of a criminal charge … only a foundation of suspicion' (para. 24). Nonetheless, it was acknowledged that 'in any case in which a person is at risk of an order containing obligations of the stringency found in this case', that person should be entitled to the Article 6 protections (para. 24).

[21] As Stahlberg and Lahmann (2011: 1076) explain, this distinction is particularly problematic in the context of terrorism-related preventive measures which might include 'retributive and punitive element(s)'. According to them, the *Engel* test affords national courts with a significant degree of discretion regarding the classification of these measures since it allows them to place particular emphasis upon their preventive objectives. This is further evident through the House of Lords' decision in *MB* (discussed above) where a balancing act was conducted in order to determine whether the non-derogating control orders should be regarded as a criminal charge for the purposes of the Convention.

Looking beyond appearances enables us to scrutinise the true nature of legal rules and identify instances of indirect criminalisation. It also allows us to draw a distinction between what Tadros (2010) describes as 'true crimes' and regulatory offences. Based on the *Engel* test though this might be problematic since it is the intention of the legislature for both kinds of wrongs to be considered as criminal rules. Our analysis, therefore, should start from the premise that regulatory offences should be regarded as criminal rules because this is what the legislature intends. The foregoing criticisms illustrate further why it is necessary for legal theorists to look beyond the official classification of legal rules and investigate if their implementation has resulted in the imposition of criminal punishment. Clearly, the official classification of a legal rule provides a good starting point in terms of determining whether it should be regarded as criminal or non-criminal, but we should take care not to place too much weight on it.[22] This should only be a starting point, not a criterion.

The second cause for concern relates to the severity of the sanctions imposed on the perpetrator, i.e. the third limb of the test. Based on *Engel*, if the sanction imposed on the perpetrator constitutes a severe deprivation of their liberty under Article 5, then it should be regarded as a form of criminal punishment (para.85). It is important to note that the ECtHR in *Engel* had to adopt a very narrow interpretation of liberty since the applicants argued that the sanctions imposed on them constituted a violation of their Article 5 rights (para.56). This led the ECtHR to interpret liberty in the context of Article 5. Consequently, in order for a sanction to meet the threshold set by *Engel* it must severely restrict the perpetrator's physical liberty (para.61-64). Accordingly, if we were to adopt the *Engel* approach as to the meaning of liberty, then we would only associate criminal punishment with imprisonment, home curfews and any other kinds of sanctions which limit the perpetrators' freedom of movement.

Although imprisonment is regarded as a paradigmatic form of criminal sanction and freedom of movement as a fundamental right, this does not necessarily mean that our analysis should be restricted only to the most severe types of sanctions. Imprisonment is just one out of the many weapons in the criminal law's arsenal that can be used against those who offend. A defendant who is found guilty of a criminal offence can be ordered to pay a fine, he can be required to compensate the victim for the harm suffered or he can

[22] See Figure 3.1.

receive a community sentence.[23] As part of this process, the sentencing court must take into consideration an array of other external factors to the wrong committed, such as the rehabilitation of the perpetrator[24] and his financial circumstances.[25] This means that sanctions imposed for the commission of a criminal offence can take various forms and vary considerably both in terms of their nature and severity.

The narrow interpretation of liberty adopted in *Engel* may in fact facilitate further subversions to the criminal law rather than prevent them. Focusing on imprisonment alone might encourage the introduction of civil measures, such as the TPIMs and the injunction, through which non-custodial sanctions can be imposed. Although these non-custodial sanctions can severely restrict the perpetrator's liberty (not necessarily his physical liberty), based on *Engel*, these measures should not be regarded as criminal rules. To prevent possible subversions to the criminal law, therefore, liberty should be interpreted more widely than in *Engel*. This will allow us to expand our analysis beyond traditional forms of criminal sanctions, such as custodial sentences, and examine whether alternative sanctions can also be regarded as a form of criminal punishment.

Another cause for concern regarding the third limb of the anti-subversion doctrine relates to the requirement of severity. As discussed earlier, the sanction imposed need not only to restrict the perpetrator's physical liberty in order to be regarded as a form of criminal punishment, but it must also do so severely, i.e. to completely restrict their ability to move freely (para.81-82).

Determining whether a given sanction constitutes a deprivation of someone's liberty can be straightforward in cases where the perpetrator receives a lengthy custodial sentence since the sanction will be severe enough to meet the threshold required by *Engel*. This, however, might not be as straightforward when a non-custodial sentence is imposed on the perpetrator. Suppose that both Andrew and Sam constantly behave in an anti-social manner whilst being in their local city centre. As a result of their behaviour many local residents feel upset and avoid the city centre, something which has a significant financial impact on local businesses. In order to prevent them from engaging in further ASB, it is decided by local authorities that they must apply for the issue of an injunction against both of them in order to prevent them from entering the city centre. For Andrew, this

[23] Section 142(1)(e) and section 151 of the Criminal Justice Act 2003 section 142(1)(e) respectively.
[24] Criminal Justice Act 2003 section 142(1).
[25] Criminal Justice Act 2003 section 164.

restriction means that he will not be able to visit some members of his family who live in the city centre. For Sam the issue of the injunction does not really mean anything as he tends to move frequently from one town to another.

If we were to determine whether the sanctions imposed on Andrew and Sam constitute of a form of criminal punishment based on *Engel*, we would have concluded that these restrictions can hardly be regarded as such since both of them can visit every other part of the city. Examined objectively these sanctions do not severely restrict their physical liberty. If a subjective assessment is conducted, however, we could argue that for Andrew the issue of the injunction deprives not only his physical freedom, but also his rights under Article 8 of the Convention, i.e. the right to private and family life. Determining, therefore, whether a particular sanction constitutes a severe deprivation of one's liberty can be contingent upon their personal circumstances. An objective assessment in this context cannot always be representative of the actual consequences that a given sanction has on the perpetrator. Equally, if we are to engage in a subjective assessment we must draft a list of factors which should be taken into consideration when determining the severity of the sanction imposed.

To illustrate further the problematic nature of the above approach, it would be instructive to compare the third limb of the anti-subversion doctrine was applied in the cases of *M* and *Ezeh*. Whilst in *Ezeh* (para. 129) the ECtHR noted that additional days of custody imposed on the appellants (i.e. forty days for the first appellant and seven for the second one) 'cannot be regarded as sufficiently unimportant or inconsequential as to displace the presumed criminal nature of the charges against them', in *M* (98) the Strasbourg Court held that depriving someone of most of his property (and in effect labelling him a criminal) is not so severe 'as to warrant its classification as a criminal penalty for the purposes of the Convention'. The above decisions beg the question whether seven days of additional custody is indeed a more severe sanction than seizing most of an individual's assets and publically condemning him as someone's who lives of the proceeds of crime. A possible solution here would be to avoid the imposition of a specific threshold all together and focus on whether the sanction in question simply interferes with the perpetrator's liberty.[26]

[26] See 3.2.1.

The formulation of the anti-subversion doctrine can clearly be regarded as a positive development since it constitutes an explicit acknowledgment by the ECtHR that non-criminal measures can be operating as *de facto* criminal rules. In doing so, however, the ECtHR decided to adopt a quite conservative approach by focusing solely on the most extreme examples of indirect criminalisation, i.e. sanctions that severely restrict the perpetrators' freedom of movement. This is of course in stark contrast with the variety of sanctions that can currently be imposed on those found guilty of an offence. A more inclusive approach, however, means that we should assess (subjectively) how the sanction in question has affected the perpetrator and whether this is sufficient to amount to criminal punishment.

### 3.2 Redefining criminalisation: Developing existing approaches

Our discussion so far has focused on the main challenges faced by both the way criminalisation has been conceptualised in the academic literature and through the anti-subversion doctrine. The main purpose of this discussion has been to examine more closely how criminalisation has been defined and explore whether these existing accounts can provide a single viable test for distinguishing criminal from non-criminal rules.

For many prominent legal philosophers, what distinguishes the criminal law from other forms of regulation is the imposition of punishment. For them, in order for a legal sanction to be regarded as criminal punishment it must: (i) allow for the imposition of 'hard treatment'; and (iii) it must intentionally and publically communicate censure. As mentioned earlier, however, this account of criminalisation was formulated to illustrate the difference between paradigmatic offences, such as the unlawful infliction of GBH, and non-criminal rules. Although this account accurately represents the difference between the two, it has been argued that it fails to take into consideration the prospect of *indirect* criminalisation since it is based on the assumption that censure is tied exclusively to the criminal label. In order to examine whether criminalisation occurs indirectly, it is essential to look beyond the label attached to each legal rule and scrutinise the nature of the sanctions imposed or threatened to be imposed on those who are found in breach of the rule in question.

Although the anti-subversion doctrine aims at looking beyond the official classification of legal rules, it has been concluded that it is in need of modification. The main reason for this is twofold. First, the anti-subversion doctrine requires an examination

of the legislature's intentions with regard to the legal rule in question (the first limb of the three-part test). In practice, this doctrine is circular in application. Rules which were explicitly regarded by the legislature as non-criminal, will inevitably fail to meet the first limb of this doctrine. Secondly, concerns have been raised regarding the third limb of the test according to which a sanction can only be regarded as a form of criminal punishment if it has severely deprived the physical liberty of the perpetrator. As noted above, this narrow interpretation of liberty is problematic because it fails to take into account the entire array of sanctions that can currently be imposed upon a guilty verdict. Moreover, it has been argued that this narrow interpretation of liberty might in fact encourage subversions to the criminal law rather than to prevent them.

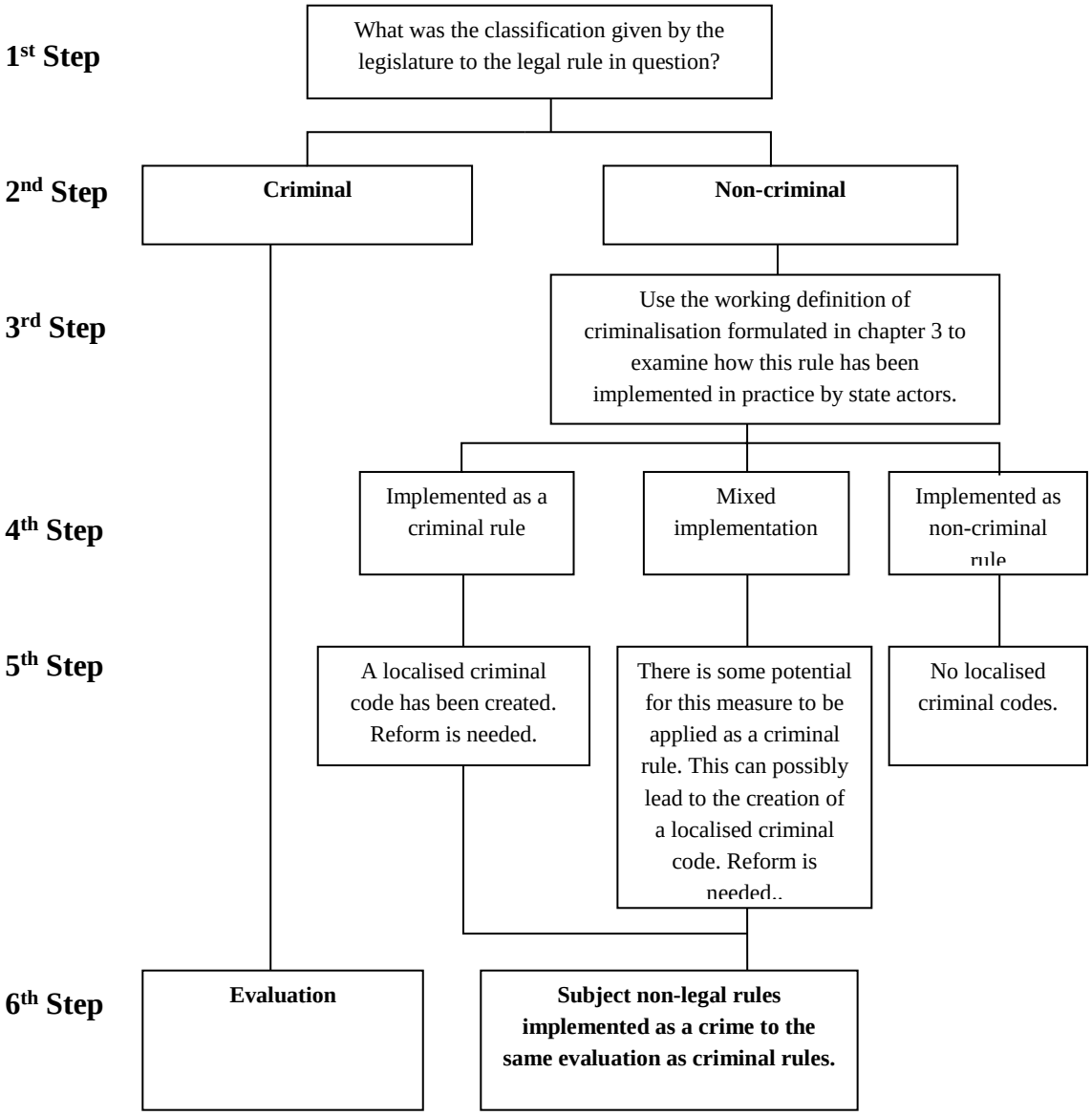
The above criticisms led to the conclusion that a working definition of criminalisation is needed through which we can distinguish criminal from non-criminal rules irrespective of the label attached to them. It has to be acknowledged from the outset that this working definition of criminalisation does not constitute a complete departure from the way criminalisation has been conceptualised through the abovementioned accounts. Instead, it was built upon the deficiencies of these pre-existing accounts aiming primarily at preventing possible subversions to the criminal law rather than to encourage them.

Similar to the accounts of criminalisation examined earlier, central to the working definition formulated below is the assumption that criminal rules are those rules which result in the imposition of criminal punishment. Criminal punishment comprises of two main prerequisites, both of which must be satisfied in order for the legal rule under scrutiny to constitute a form of criminalisation. The two prerequisites of this working definition are:

(i) The legal rule must threaten to impose and/or its implementation must result in the imposition of a sanction which limits the perpetrator's liberty; and

(ii) The sanction imposed and/or threatened to be imposed on the perpetrator must publically and purposefully communicate censure.

**Figure 3.1: Applying the working definition of criminalisation in practice**[27]




As illustrated in Figure 3.1, this working definition of criminalisation cannot pre-determine whether certain kinds of sanctions constitute a form of criminal punishment. Rather, it requires us to scrutinise each sanction individually in order to examine whether it satisfies both prerequisites.[28]

[27] Figure 3.1 constitutes a working definition of criminalisation that provides a step by step process to determine whether a localised criminal code is created or not.
[28] I will further discuss this need to assess each case individually during my evaluation of the working definition of criminalisation in 3.3.

3.2.1 To limit the perpetrator's liberty

Central to both accounts of criminalisation scrutinised earlier, is the need for the sanction imposed to interfere with the perpetrator's liberty, i.e. the imposition of 'hard treatment'. For Feinberg (1965), a distinction must be drawn between mere penalties, such as parking fines and disqualifications, and sanctions which amount to punishment, such as imprisonment. According to him, sanctions like parking fines can hardly qualify as a form of punishment (Feinberg, 1965). Seen in this way, 'hard treatment' must have a severe impact on those who offend (Feinberg, 1965). Although based on his account punishment appears to have a more severe impact on the offender than a penalty, he acknowledged that this might not always be the case since penalties can also be heavy-handed (Feinberg, 1965). Similarly, based on the anti-subversion doctrine, the sanction imposed needs to severely restrict the perpetrator's physical liberty if it is to be regarded as a form of punishment. As discussed earlier though, drawing a distinction between sanctions that severely restrict someone's physical liberty and those which do not, can be particularly problematic especially when scrutinising non-custodial sentences.[29] For this reason, the working definition of criminalisation formulated above sought to adopt a more inclusive approach focusing on any sanction that interferes with someone's liberty.

At first sight, both the working definition formulated in this chapter (the first prerequisite) and the abovementioned accounts of criminalisation appear to require a deprivation of the perpetrator's liberty. Although this is true, the interpretation of liberty adopted by each stance varies considerably. As Moore (2014: 184) rightly contends, liberty can be interpreted in various ways due to the fact that it can 'mean a lot of things to a lot of different people'. According to him, to be left free without any interference by the state is not always desirable since this will allow people to 'do evil' (Moore, 2014: 184, Dworkin, 1996). It is for this reason that as members of the community we must accept some deprivation of our liberty, such as restricting our freedom to 'do evil', in order for the state to guarantee to us a number of other more important and valuable freedoms, such as to protect us from others' evil behaviour (Rousseau, 1998). On this view, not 'all instances of coercion are equally objectionable' (Husak, 1983: 357, Feinberg, 1973). Road users, for instance, must accept a deprivation of their liberty by driving on a particular side of the road, in exchange for a more secure road network.

[29] See 3.1.2.

Liberty, therefore, should be interpreted as a set of valuable freedoms rather than as an all-encompassing abstract term (Raz, 1986).

The above account of liberty requires a distinction between those freedoms which are valueless, such as the freedom to 'do evil', and those which are worthwhile, such as the right to life (Raz, 1986). A potential solution here would be to draft a list of basic and/or fundamental liberties which form the backbone of every contemporary liberal society. Raz (1986: 246) is critical of this approach and points out that a 'list of basic liberties is a matter of contention' and only a handful of freedoms, such as the right to family, can certainly be included in our list. Instead, Raz (1986: 246) proposes a distinction based on the 'contribution [that these freedoms] have to the ideal of personal autonomy'. Based on his account, if a particular freedom, such as the freedom of religion, is capable of enhancing one's autonomous life, then it would be justifiable to hold 'members of the society at large to be duty-bound … to provide [individuals] with the social environment necessary' to exercise their religion (Raz, 1986: 247).

Although Raz's assertion that a list of basic and/or fundamental freedoms can be a very contentious matter appears to be reasoned, this approach should not be dismissed outright. In many jurisdictions, such as in the United States, an indication as to what is regarded as a basic and/or fundamental freedom can be provided through a closer examination of the rights protected under the Constitution. In the absence of a written constitution, such as in the case of England and Wales, our focus could shift to other authoritative sources of law. As far as England and Wales is concerned, the main focus can be on the rights found in the Human Rights Act 1998 (HRA 1998). The HRA 1998 has incorporated in this jurisdiction most of the rights and freedoms guaranteed under the ECHR, such as the 'freedom of expression' and 'the protection of property'.[30] The enactment of the HRA 1998 indicates that these rights and freedoms are to be regarded as basic and/or fundamental for this society since they reflect its core values and principles. For the purposes of this working definition, liberty is conceptualised in terms of those rights and freedoms guaranteed to every citizen in this jurisdiction through the HRA 1998.

The final aspect of the first prerequisite relates to the required threshold that the restrictions on one's liberty must meet in order to qualify as a potential form of criminal

[30] Article 10 and Article 1 of the First Protocol of the ECHR respectively.

punishment. As discussed earlier, in both academic discourse and in *Engel* it has been suggested that in order for a legal sanction to potentially qualify as a form of criminal punishment, it must severely restrict the perpetrator's liberty.[31] Feinberg (1965), for example, argued that imprisonment is a paradigm form of 'hard treatment' whereas parking fines should be regarded as mere penalties. Similarly, in *Engel*, the ECtHR held that only when the perpetrator is 'kept under lock and key' the sanction imposed against him can be regarded as a form of punishment (para. 61-64).

This thesis contends that a working definition of criminalisation should not require the sanction imposed to *severely* restrict the perpetrator's liberty in order for qualify as a potential form of criminal punishment. In fact, it should include no such requirement at all. Simply put, if the sanction under scrutiny interferes with the perpetrator's liberty as this was defined above, then the first prerequisite is satisfied. The degree of deprivation is irrelevant for the purpose of determining whether the first prerequisite is satisfied. The reason for this is twofold. First, the imposition of 'hard treatment' does not only serve an instrumental purpose, such as the incapacitation of the offender, but it also has a symbolic meaning. As von Hirsch (1993) points out, the severity of 'hard treatment' should be a reflection of the perpetrator's blameworthiness. Accordingly, the higher the blame, the more severe the 'hard treatment' should be and vice versa. On this view, the sanctions imposed by criminal law should range from mild deprivations of liberties, such as a relatively small fine, to life imprisonment. Based on the pre-existing account of criminalisation analysed above, only those sanctions at the top end of the ladder can amount to criminal punishment. If this line of argument is true, we must then restrict the ambit of the criminal law only to the most serious kinds of moral wrongs, i.e. to wrongs which would justify the imposition of a severe deprivation of the perpetrator's liberty. For those who advocate for the use of the criminal law as a 'last resort' measure, this could be the most preferable option since criminalisation would be reserved for the most serious kinds of moral wrongdoing, but this is descriptively inaccurate as to the current criminal law.[32]

Secondly, the imposition of any threshold in this context can cause unnecessary ambiguities as to what qualifies as a severe restriction of liberty. To illustrate this point, consider the following hypothetical. Sam, who is a young unemployed individual,

[31] See 3.1.
[32] For more on criminalisation as a 'last resort' measure see Husak (2004).

receives a £500 fine for driving beyond the speed limit. This fine is likely to have a severe impact on Sam since he will find it very difficult to pay his rent for the next few months; he might even have to sleep rough. Andrew, a multibillionaire, receives a £500 fine as well for driving beyond the speed limit. Both of them were driving at the same speed, on the same road and at the same time. In contrast to Sam, this £500 fine will barely affect Andrew's life.

If we were to strictly apply the *Engel* approach, then we would have concluded that the fine imposed on both of them does not constitute a form of punishment since it does not restrict the perpetrators' physical liberty. Nevertheless, if one adopts the interpretation of liberty advanced above, it could be argued that the fines imposed interfere with the ability of the perpetrators to enjoy their property freely. Is this interference sufficiently severe to qualify as a 'hard treatment'? If this is to be assessed objectively without paying attention to Sam's financial situation, then it is unlikely that a £500 fine would severely restrict someone's enjoyment of his property. Still the pressing question is where do we draw the line between sanctions which constitute a severe deprivation of the perpetrator's liberty and those sanctions which are not? Although such a distinction can be easier to apply when scrutinising custodial sentences, this might not be as straightforward when dealing with other types of sanctions imposed either by criminal law or by other forms of regulation.

As far as the foregoing hypothetical is concerned, the impact that these sanctions have on the perpetrators vary considerably due to their financial circumstances. If our assessment was based on purely subjective grounds, then we could argue that only the sanction imposed on Sam is severe enough to qualify as a form of 'hard treatment'.[33] On this view, if we wished to impose a 'hard treatment' on Andrew as well, then we should have imposed on him a considerably higher fine than the one imposed on Sam.[34] Imposing a considerably higher fine on Andrew, however, due to the fact that he is a multibillionaire would constitute a disproportionate response to the wrong committed. Moreover, to punish Andrew on those terms would be morally controversial since based on the

[33] For courts, however, it would be impracticable and probably too expensive to accurately assess the exact impact that a fine is likely to have on the perpetrator.

[34] According to the sentencing guidelines issued by the Sentencing Council there are six different fine bands. The fine band applicable in each case is determined by the seriousness of the offence committed by the accused. Each fine band will determine the maximum amount of fine that can be imposed on the accused. Although Andrew is likely to receive a higher fine than Sam due to his financial prosperity, this fine cannot exceed the maximum amount applicable for that particular fine band. See Sentencing Council.

principle of proportionality 'the severity of a sanction [must reflect] the stringency of the blame' (von Hirsch, 1993: 15).[35] Andrew's conduct is as blameworthy as Sam's conduct and thus the sanction imposed on both of them should be at least similar if not identical. To hold otherwise, would result in the imposition of a different sanction for the same wrong. This would contradict with one of criminal law's core function of punishing the blameworthiness of a particular kind of behaviour (Simester & von Hirsch, 2011), rather than the imposition of something akin to progressive punishment where the higher the income the higher the fine will be.[36]

For the reasons given above we should refrain from setting a specific threshold of severity that each sanction must meet in order for the first prerequisite to be satisfied. Instead, we should require that the sanction imposed or threatened to be imposed on the perpetrator simply limits the ability of the wrongdoer to enjoy his liberty. This will enable us to focus on the actual sanction imposed rather than on assessing how severely the sanction imposed limits the perpetrator's liberty. This, however, means that the net of potential criminal rules is cast very widely and thus the role of the second criterion becomes even more important in terms of identifying those rules which can result in the imposition of criminal punishment.

### 3.2.2 It must communicate censure

The second prerequisite of this working definition is that the sanction imposed (or threatened to be imposed) needs to *publically* and *purposefully* condemn the perpetrator and his behaviour. As Duff (2010) explains, what really distinguishes criminal sanctions from other types of sanctions imposed by law is their ability to publically condemn both the offender and the wrong committed. To formally criminalise a particular kind of behaviour is to publically condemn it (Duff, 2001; Walters, Forthcoming). Through criminalisation a message is conveyed (intentionally) to society that the behaviour criminalised is so blameworthy that is worth criminalising (Kadish, 1987). Accordingly, to be found guilty of an offence is to be publically condemned as a moral wrongdoer. This is one of the main reasons why a criminal conviction can result in the stigmatisation and social ostracisation of the perpetrator by the rest of the community (Ashworth & Horder, 2013). This account provides an accurate description of how *direct* criminalisation

[35] For more on the principle of proportionality see 2.3.2.

[36] Although progressive punishment ensures that each sanction affects the perpetrators equally, as noted before this approach will cause similar cases to be treated differently based on the perpetrator's financial situation.

communicates censure. Nonetheless, it provides no guidance as to how censure can be communicated *indirectly* through non-criminal legislation. This was one of the main reservations expressed about the way criminalisation is conceptualised in the academic literature.[37]

As far as *indirect* criminalisation is concerned, our starting point should not be the label attached to the legal rule at stake, but its implementation. The fact that the legislature decided not to classify a particular rule as criminal, indicates that its intention was not to publically condemn the behaviour regulated. As discussed earlier, however, certain non-criminal rules, such as the injunction, appear to allow for the imposition of sanctions akin to criminal punishment. In order to examine whether these measures operate as *de facto* criminal rules, it is necessary to look beyond the label attached to them by the legislature and investigate what the *purpose* of the sanctions imposed through these measures is. If the purpose of these sanctions is solely to prevent certain undesirable outcomes, such as further ASB, and there is no public denunciation of the perpetrator in question, then the second prerequisite of the working definition is not satisfied. However, if there is evidence to suggest that the *purpose* of the sanction imposed was to inflict pain and there are public forms of stigmatisation attached to it, then this will satisfy the second prerequisite of the working definition.

State actors, such as the police, can purposefully communicate censure through various ways. For this reason, an exhaustive list of how censure can be purposefully communicated (when moving away from direct criminalisation) cannot be provided. Instead, it is necessary to assess each case on its own merits and examine whether the sanction imposed on the perpetrator aimed at his public denunciation. To illustrate this, consider the following hypothetical. Suppose that Sam is a suspected terrorist and that a home curfew has been imposed on him through a TPIMs notice.[38] Here, it is important to remind ourselves that for the imposition of a TPIMs notice the suspected terrorist need not be convicted of any offence. The Secretary of State needs only to establish a *prima facie* case against that individual and that the allegations against that him are not

[37] See 3.1.1.

[38] The reason why I am referring here to the TPIMs instead of the injunction is twofold. First, I elaborate further on how the injunction can be implemented in a manner that results in the public and purposeful condemnation of those subjected to it below (see 4.2.2.2). Secondly, as discussed earlier, other civil preventive measures, such as the TPIMs, raise similar considerations as those raised by the ASBOs and now the injunction. Hence, it would be instructive to refer to the TPIMs here in order to illustrate this further (see 'Introduction').

'obviously flawed'.[39] It follows that the intention of the legislature was not to label the TPIMs as criminal measures. Rather, the legislature intends for these measures to prevent terrorism-related activities. Nonetheless, the police's counter-terrorism unit decided to publicise Sam's story along with his personal details as a means of reassuring the public that action has been taken against a potential terrorist. In this press release colourful language has been used against Sam and his behaviour. Following this press release Sam has been stigmatised by the rest of the polity as a terrorist sympathiser and aider. Although the main objective of this press release was to reassure the public, it is evident that it also sought to publically condemn Sam. Clearly, the public denunciation of Sam was not incidental. Rather, the use of colourful language suggests that this was amongst the purposes of this press-release. In this case, the second prerequisite of the working definition is satisfied and thus the home curfew imposed on Sam should be regarded as criminal punishment.[40]

Thus far, this chapter has scrutinised both the academic literature on criminalisation and the anti-subversion doctrine formulated by the ECtHR in *Engel*. The main objective of this analysis has been to explore whether these accounts can lead to a single viable test based on which we can distinguish criminal from non-criminal rules. Upon closer scrutiny of these accounts, certain problems and inconsistencies have been identifying. These problems and inconsistencies necessitated the formulation of a working definition of criminalisation. This test does not constitute a complete departure from the pre-existing accounts of criminalisation. Rather, these accounts have formed the basis for this new test the main objective of which is to identify criminal rules regardless of the label attached to them by the legislature. In the remainder of this chapter an evaluation of this working definition will be provided.

## 3.3 An evaluation of the working definition of criminalisation

### 3.3.1 Limitations

The working definition of criminalisation formulated above can be criticised on four grounds. First, it can be criticised for being potentially over-inclusive since it can cover any kind of sanction which slightly deprives someone's liberty. This can be attributed to the first prerequisite of the working definition which requires mere interference with the

[39] Section 6(3)(a).
[40] I will elaborate further on how the working definition of criminalisation can be applied in practice in 4.2.2.

perpetrator's liberty. Although at first sight this criticism appears to be valid, it is essential to reiterate that in order for a sanction to be regarded as a form of criminal punishment both prerequisites must be satisfied. If the sanction imposed interferes with the perpetrator's liberty but does not *publically* and *purposefully* communicate censure, then the second prerequisite will not be satisfied and the test will not be made out. Moreover, it must be borne in mind that this assessment does not relate to the justifiability of criminalisation. Rather, this working definition assists us to determine whether the restrictions imposed on the perpetrator amount to criminal punishment and thus constitute a form of criminalisation. The issue as to whether criminalisation can be warranted should form part of a different exercise at a later stage.

Secondly, concerns can be raised about the fact that if this working definition of criminalisation is to be adopted, then a detailed examination of each and every legal rule and its implementation will be needed. In the context of the ASB tools and powers, a case-by-case analysis of every injunction or a CBO will be needed in order to determine whether in each case the sanctions imposed meet both prerequisites of the working definition of criminalisation. In some cases, we might conclude that the implementation of the injunction amounts to criminalisation whereas in some other instances this might not be the case.[41] This of course reiterates the ambiguous scope of the law in this area and the extensive degree of discretion given to local enforcement agents and the courts regarding the implementation of the injunction.[42]

Thirdly, another reservation that can be raised about this working definition of criminalisation relates to the need to examine how the legal rule in question has been implemented in the past. In effect, this means that we can only assess whether the legal rule in question has been operating as a *de facto* criminal measure after the perpetrator has already been punished in the absence of the enhanced procedural protections. At first sight, therefore, this working definition cannot assist in preventing the indirect criminalisation of certain kinds of behaviour. Rather, it only manages to identify instances where non-criminal rules resulted in the imposition of criminal punishment.

Although this working definition cannot prevent all instances of indirect criminalisation, it can still be used by courts to assess how similar rules as the one in

[41] See step 5 of Figure 3.1.
[42] See 'Anti-social behaviour in England and Wales'.

question have been implemented in the past in order to determine its likely status. If there is evidence to suggest that on numerous occasions the implementation of the injunction has resulted in the indirect criminalisation of certain kinds of behaviour, then the court can take additional steps to ensure that this will not happen in the future. For instance, if there is evidence to suggest that local enforcement agents in question have previously issued press releases as a means of publically condemning young individuals against whom an injunction was issued, the court can issue a 'section 39 order (Children and Young Persons Act 1933) prohibiting publication' of the perpetrator's details, such as his name and address (Home Office, 2014: 20-21).

Finally, although this working definition of criminalisation can be a very useful tool for legal theorists in order to determine whether the implementation of non-criminal rules resulted in the indirect criminalisation of certain kinds of behaviour, it has to be admitted that cases like *Engel* and *McCann* illustrate that this approach is unlikely to be adopted by courts. As seen earlier, in both cases, emphasis was placed on the legislature's intentions about the legal rules in question. In *McCann*, the fact that the ASBO was introduced as a means of preventing ASB was one of the main factors which led the House of Lords to conclude that this was a civil rather than a criminal order (para. 72). In addition to this, due to time and resource constraints it seems unlikely for the courts to adopt an approach which would require a very detailed analysis of each and every case. Instead, it will seem more sensible and practicable for courts to favour a more general approach similar to the one adopted in *McCann*. The above is not to argue that the courts should not revise their current approach for scrutinising rules which are susceptible to indirect criminalisation. Rather, it is to point out that a shift to a new approach similar to the one advanced through the working definition of criminalisation formulated above, is unlikely to occur primarily due to practical considerations.

### 3.3.2 The advantages of this working definition

Notwithstanding the abovementioned limitations, the main advantage of this working definition is its ability to look beyond the official classification of legal rules. This enables us to focus on the nature of the sanctions imposed and investigate whether the implementation of a legal rule has resulted in the indirect criminalisation of certain kinds of behaviour regardless of the label attached to this rule by the legislature. For the purposes of this thesis, this working definition can assist us to determine whether local practitioners and the police have created their own localised criminal codes through the

implementation of the injunction's first limb. This of course presupposes a clear understanding of *what it is to criminalise*. To do so, one should pre-determine the necessary conditions under which the implementation of a legal rule can lead to the imposition of punishment and thus be regarded as a form of criminalisation. The next step of this process is for the findings of this study to be analysed in light of the working definition for criminalisation formulated above. If there is evidence to suggest that the sanctions imposed on those against whom an injunction is issued satisfy all the prerequisites of this definition, then this will constitute a form of *indirect* criminalisation. In this case, the injunction should be evaluated as a criminal rather than as a non-criminal rule.

The working definition of criminalisation formulated in this chapter, therefore, allows for the adoption a more holistic approach to criminalisation by taking into consideration both *direct* and *indirect* criminalisation. This enables us to scrutinise not only the implementation of the injunction, but the use of any legal rule which, in theory, allows for the imposition of restrictions on akin to criminal punishment. Through this working definition of criminalisation, we will also be in a better position to identify and prevent instances of *indirect* criminalisation. Consequently, even if this working definition of criminalisation is not formally adopted for reasons of practicality in the courts (e.g. due to the need to closely examine the implementation of the legal rule in question), it remains an essential devise for legal commentators who wish to examine more closely potential subversions to the criminal law.

**Conclusion**

The main objective of this chapter has been to identify a single viable test for distinguishing criminal from non-criminal rules (the second research question of this thesis). To achieve this, this chapter has initially focused on how criminalisation has been defined in legal and academic discourse and the way courts sought to deal with non-criminal rules which appear to be susceptible to indirect criminalisation. Through the close analysis of both stances a number of problems and inconsistencies have been identified. Central to both accounts is the need to focus on the legislature's original intentions with regard to the legal rule in question. If our account of criminalisation is contingent upon the legislature's objectives, then our assessment will be circular in application since we would be unable to examine whether non-criminal rules constitute a form of criminalisation.

The problems and inconsistencies of these pre-existing accounts of criminalisation led to the formulation of a new test which enables us to look beyond the official classification of legal rules and investigate whether their implementation has resulted in the indirect criminalisation of certain kinds of behaviour. The working definition formulated above is not a new theory of criminalisation nor is it an attempt to re-theorise the moral boundaries of the criminal law. Rather, it has been based upon the pre-existing accounts of criminalisation scrutinised above, but unencumbered by the practical constraints that have artificially restrained the courts' own approach. Its primary objective is to identify the circumstances under which the implementation of a legal rule can constitute a form of criminalisation regardless of it is classification and the legislature's objectives.

# Chapter 4: A theoretical analysis of the law on anti-social behaviour

The impetus to formulate a working definition of criminalisation in chapter 3 emanated primarily from the problems and inconsistencies of previous attempts to conceptualise criminalisation. One of the main concerns raised about these pre-existing accounts of criminalisation related to the need to be able to effectively look beyond the official classification of non-criminal rules and examine whether they are operating as *de facto* criminal measures. Central to this thesis is the need to investigate whether the implementation of injunction's first limb has resulted in the indirect criminalisation of certain kinds of behaviour. The importance of this investigation is twofold. First, if there is evidence to suggest that indeed the injunction's first limb has been operating as a *de facto* criminal measure, then it is necessary to ensure that those against whom it is issued are afforded the same level of protection, i.e. the enhanced procedural protections, as those facing criminal prosecution. Secondly, if the injunction's first limb is operating as *de facto* criminal measure, then we must subject it to the same level theoretical critique as criminal rules. Before examining empirically the implementation of the injunction's first limb, it is essential to investigate whether, in theory, it is possible for it to be used in a manner that would satisfy both prerequisites of the working definition of criminalisation formulated in chapter 3.

This chapter is divided into two parts. The first part scrutinises the current law on ASB and the most important amendments brought in by the 2014 Act. This provides a clear understanding of the law relating to ASB and lays the foundations for the theoretical analysis of the injunction's first limb. Central to this analysis is the shift to a purely civil response (i.e. the injunction) and whether this undermines any potential for indirect criminalisation.

In the second part of this chapter, the injunction's first limb is used as a case study in order to investigate if, in theory, this can be implemented in a manner that would satisfy both prerequisites of the working definition of criminalisation formulated in chapter 3. Within this analysis, particular reference is made to the significant degree of discretion granted to local enforcement agents and the courts regarding the potential implementation of the injunction. This chapter concludes by exploring the possibility for the

implementation of the injunction's first limb to vary considerably from one area to another, primarily due to the significant degree of discretion given to local enforcement agents.

### 4.1 Addressing anti-social behaviour

Before examining the injunction's first limb with reference to the working definition of criminalisation, it is important to focus on how the injunction and the CBO appear on the statute book and scrutinise the major changes brought in by the 2014 Act.[1] The reason for choosing these measures rather than the TPIMs or other civil preventive measures lies in their widespread application and extensive use. The extensive use of these measures is evident by the fact that between April 1999 and December 2013 more than 24000 ASBOs have been issued (Home Office & Ministry of Justice, 2014a).

#### 4.1.1 A critique of the ASBO

The legislature chose initially to address ASB through the introduction of the ASBO under section 1 of the 1998 Act. The ASBO, as mentioned earlier,[2] constituted a two-stage criminalisation process where a civil order was issued against an individual who behaved in an anti-social manner (the first stage) (Simester & von Hirsch, 2011). During the initial stage of this process, the court examining the application for the issue of an ASBO could impose any restrictions deemed *necessary* on the perpetrator in order to prevent further ASB in the future.[3] If an ASBO was issued, then the defendant was prohibited 'from doing anything described in the order'.[4] Breach of these restrictions without any reasonable excuse constituted a criminal offence, the maximum sentence for which was five years imprisonment and a fine (the second stage).[5]

The second stage of the ASBO can be characterised as an example of *direct* criminalisation since breach of the order constituted an offence. According to Duff and Marshall (2006), this two-stage criminalisation process did not only allow for the imposition of criminal punishment during the second stage, but it also allowed for the

[1] As noted earlier, the main focus of this thesis is the injunction's first limb. However, reference will be made to the CBO's first limb and any other informal interventions used by local enforcement agents to address ASB as well. This will enable us to explore further whether the use of these measures raises similar normative challenges to those raised by the injunction's first limb. It will also provide a more holistic account of how ASB is addressed at a local level. See 'Research objectives'.
[2] See 'The pre-2014 approach to anti-social behaviour'.
[3] Section 1(6).
[4] Section 1(4).
[5] Section 1(10)(b).

imposition of restrictions akin to criminal punishment at the initial stage as well. On this view, it was possible for the first limb of the ASBO to constitute a form of *indirect* criminalisation.

What also appeared to be problematic about the administration of ASB, was the use of certain informal interventions by local enforcement agents before applying to court for the issue of an ASBO. Evidence from a study conducted by Crawford et al (2016), suggests that the 'ASBOs represent[ed] only the very tip of a much larger structure of proactive ASB interventions'. Their study focused not only on the issue of the ASBO, but they also scrutinised the pre-ASBO stage and the use of formal warning letters and ABCs issued to young individuals (Crawford, Lewis, & Traynor, 2016). Evidence from Crawford et al's (2016) study suggests that sometimes young people were 'forced' to sign ABCs out of fear of losing their accommodation. What is important for the purposes of this thesis is the nature of the restrictions imposed on those against whom these informal interventions were used and whether they amount to a form of criminal punishment in their own right.

### 4.1.2 Scrutinising the 2014 amendments

The most important amendment brought by the 2014 Act has been the repeal of the ASBO with a purely civil injunction.[6] As a result of this, those found in breach of their injunctions cannot be arrested immediately unless a power of arrest has been attached to the injunction. Due to the hybrid nature of the ASBO, if the police had evidence which proved that an individual breached their ASBO, then they could arrest the perpetrator immediately. This is not the case, however, under the new scheme. The court examining the application for the issue of an injunction can attach a power of arrest to it only if it is satisfied that: (i) the respondent used or threatens to use violence against others; or (ii) that 'there is a significant risk to others' due to the respondent's behaviour.[7] If a power of arrest is attached to the injunction, then the police can arrest the perpetrator without any warrant (House of Commons, 2013). Otherwise, the police must apply for the issue of a warrant (House of Commons, 2013). This shift towards a purely civil approach also means that breach of the injunction will not appear on the perpetrator's criminal record.[8]

[6] See 'The current law on anti-social behaviour'.
[7] Section 4(1) of the 2014 Act.
[8] National Police Records (Recordable Offences) Regulations 2000 regulation 3(1)(a).

Previously, breach of the ASBO constituted a recordable offence and those who breached the terms of their orders had to carry the stigma of a criminal conviction.

Another major development has been the introduction of positive obligations. Under the 1998 Act those against whom an ASBO was issued could only be prohibited from doing anything mentioned in the order. If there was, for example, evidence to suggest that Sam, who was an alcoholic, was congregating with others in the town centre after midnight causing ASB, then the court examining the application for the issue of an ASBO could allow for the imposition of a home curfew during night hours on the defendant in order to prevent him from behaving in the same manner in the future. The imposition of restrictions alone, however, could not necessarily address the underlying causes of ASB and thus provide permanent relief to local communities. Evidence suggests that the imposition of exclusion zones or other forms of prohibitions did not provide long term relief from ASB. Rather, according to a number of studies,[9] such as the one conducted by Matthews et al (2007: 4), the imposition of these prohibitions led to the 'displacement of crime and anti-social behaviour both within' the same town and nearby places. Instead of addressing the underlying causes of ASB, these prohibitions encouraged the perpetrators to move to a different area where they would be able to continue causing problems uninterrupted.[10]

The 2014 Act sought to provide local agencies with a more effective legal framework which would enable them to address the underlying causes of ASB (Home Office, 2014). In order to achieve this, under the new scheme a court examining an application for the issue of an injunction or of a CBO can impose both negative and positive obligations on the perpetrators.[11] In the case of Sam, for instance, he can be prohibited from entering the town centre and at the same time ordered to attend an alcohol-related rehabilitative programme. Thus, the 2014 Act starts from the premise that the imposition of some bland prohibitions on the perpetrators cannot be a sufficient response to ASB.[12] As the Home Office (2014: 23) points out, it is the responsibility of the institutions applying for the issue of an injunction 'to tailor the positive requirements

[9] See, for example, Edwards and Hughes (2008).
[10] As Sager and Jones (2001) point out, this was particularly evident in the case of prostitution where the imposition of exclusion zones simply resulted to the relocation of the problem.
[11] Section1(4) and section 22(5) of the 2014 respectively.
[12] Evidence from a study conducted by Lewis et al (2016) suggests that positive obligations were already used at the pre-ASBO stage by some local practitioners and the police. This is in line with the findings of this study which will be discussed in more detail in 5.2.2.

in each case to address the respondent's individual circumstances, behaviour and needs'. Hence, the new scheme enables local practitioners and the police to actually shape the terms of an injunction and to decide what is the best strategy for combating the ASB at stake.

Although the introduction of these positive requirements has the potential of addressing the underlying causes of low-level criminality and ASB, it also raises concerns as to the constraints placed on the perpetrators' liberty and whether these can constitute a form of criminal punishment in their own right. This assumption should be examined in light of the conditions that need to be met in order for an injunction to be issued. As the 2014 Act appears on the statute book, the issue of an injunction seems much easier now when compared to the ASBO. Under the 1998 Act, an ASBO could only be issued if the court examining the application was satisfied that the order was '*necessary* to protect relevant persons from further anti-social acts' by the defendant (emphasis added).[13] In contrast, under the section 1(3) of the 2014 Act, the court examining an application for the issue of an injunction must consider 'it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour'. The imposition of a lower threshold can partly be compensated by the abolition of the ASBO's minimum duration requirement. Whilst ASBOs lasted for a minimum period of two years,[14] under the 2014 Act there is no such a requirement. In the case of a minor, an injunction can last no longer than twelve months.[15]

Finally, it is worth noting that under the new legal framework there has been a change in the forum of the proceedings for the issue of an injunction. The vast majority of the applications for the issue of an ASBO were examined by the Magistrates' Court (Hoffman & MacDonald, 2010) whereas under the 2014 Act in the case of an adult the application for the issue of an injunction is examined by the County Court or the High Court and for those under the age of 18 by the Youth Court.[16] In principle, the 2014 Act has transformed the ASBO to a purely civil and multipurpose injunction (House of Commons, 2013).

[13] Section 1(1)(b).
[14] Section 1(3).
[15] Section 1(6).
[16] Section 1(8).

It follows from the above analysis of the 2014 amendments that under the new legal framework the ASBO (the hybrid nature of which attracted most of the criticisms) has been repealed by a purely civil instrument. Nonetheless, the introduction of positive obligation makes, at least in theory, the first limb of this two-step regulation model potentially more restrictive than before. Although breach of the injunction does not constitute an offence, the 2014 Act appears to allow the imposition of more restrictions on the perpetrators' liberty when compared to the pre-2014 legal framework. This expansion in the kind of restrictions that can be imposed on the perpetrators' liberty should of course be examined in light of section 1(3) of the 2014 Act which makes the imposition of certain restrictions much easier than before. The importance of this study, therefore, does not only remain unaffected by the repeal and replacement of the ASBO, but it is instead heightened by the potentially more restrictive nature of the injunction's first limb.

As far as the CrASBO is concerned, this has been repealed under Part 2 of the 2014 Act by the CBO which retains the two-stage criminalisation process. Similar to the CrASBO, the CBO is a post-conviction order which can only be imposed on those found guilty of an offence. As with the pre-2014 legal framework, there is no need for the offence that triggers the issue of a CBO to be associated with the perpetrator's ASB. Moreover, similar to the injunction, both positive and negative obligations can be imposed on those against whom such an order is issued. At first sight, therefore, the first limb of the CBO is potentially more restrictive than the first limb of the CrASBO as well.

### 4.2 A form of criminalisation?

Thus far, the main objective of this chapter has been to scrutinise the current law on ASB and the most important amendments brought by the 2014 Act. An equally important objective has been to reflect on these amendments and emphasise that despite the move to a civil injunction it is important to remain mindful of the restrictions imposed both prior to the use of any formal interventions, and during the initial stage of this two-stage regulatory process. As noted above, the importance of this assessment is heightened by the fact that under the 2014 Act the first limbs of the injunction and of the CBO are potentially more restrictive than their predecessors. It is also clear from the above analysis of the 2014 amendments that the nature and severity of the restrictions and/or obligations that can be imposed on those against whom an injunction or a CBO is issued can vary

considerably depending on how local enforcement agents decide to use the significant degree of discretion granted to them.

The next part of this chapter proceeds to examine the current law in this area with reference to the working definition of criminalisation formulated in chapter 3. The underlying objective of this analysis is to explore whether the injunction's first limb can be implemented in a manner that can result in the *indirect* criminalisation of certain kinds of behaviour.

### 4.2.1 The legislature's objectives

To obtain an enhanced understanding of the ASB tools and powers, it is essential to begin our analysis of these measures by examining in more detail the legislature's main objectives with regard to the 2014 amendments. According to the Government, the new ASB legal framework has two primary objectives. First, the 2014 Act aims to provide a more effective and flexible legal framework to local communities (House of Commons, 2013). As the Home Office (2012) maintains, ASB can be best addressed through early interventions by using informal pre-enforcement tools, such as the ABC. For this reason, it has been argued that local enforcement agents should be afforded more discretion in order to be able address ASB more swiftly and effectively without the need to resort to any form of legal action against the perpetrator (Home Office, 2012).

Secondly, the new legal framework does not only seek to *prevent* low-level criminality and ASB, but it also aims to adopt a more victim-oriented approach (Home Office, 2014). For Duggan and Heap (2014: 8), what is important about the 2014 amendments is that what started as an attempt to address neighbour disputes 'has [now] transformed into an area which currently focuses on protecting vulnerable and/or repeated victims from a wide range of ASB types' including hate motivated ASB. As the Home Office (2014: 1) explains, 'in many cases, the behaviour is targeted against the most vulnerable in our society and … when targeted and persistent, can have devastating effects on a victim's life'. This acknowledgement of ASB's potential impact has led to the conclusion that victims should 'become the focus of the [new] response' by paying particular attention to the level of risk faced by them (Home Office, 2014: 2).

The first issue to be addressed here is what a victim-oriented approach entails and how this can affect the administration of ASB. In the context of hate crimes, Iganski (2008) contends that a victim-oriented approach must be adopted as a means of

conceptualising crimes of this nature. Based on his account, if a victim of an assault felt that the perpetrator's conduct was motivated by ethnic or religious prejudice,[17] then this behaviour should be treated from the outset as a hate incident (Iganski, 2008). On this view, a hate crime is to be conceptualised subjectively based on how the victim has perceived the perpetrator's behaviour rather than based on an objective interpretation of the incident in question. This approach, according to Iganski (2008), enables us to understand the actual impact of hate crimes on victims and through this enhanced understanding be in a better position to repair the harm suffered. It follows that a victim-oriented approach does not only aim to repair the harm suffered by the victim, but it also aims to involve victims in the process of shaping the crime policies at stake. This approach does not only enable victims to be heard, but it also allows them to actively engage in certain parts of the process.[18]

In the context of ASB, one of the most important developments towards the adoption of a more victim-oriented approach has been the provisions under Part 6 of the 2014 Act which aim to give victims a more active role in terms of managing and shaping ASB strategies at a local level (Home Office, 2014). As the title of Part 6 suggests, its main objective is to promote 'local involvement and accountability' through the introduction of two new tools: (i) the Community Remedy; and (ii) the Community Trigger. Greater local involvement, in this context, is to be achieved by allowing local communities to develop their own unique Community Remedy. The Community Remedy is an 'out-of-court punishment' available for those who have committed minor criminal offences and ASB (Home Officer, 2014: 11). A statutory duty under section 101(1) of the 2014 Act has been imposed on every Police and Crime Commissioner to draft a list of possible actions that the perpetrator might be asked to do (after consulting with local enforcement agents and the public) 'when a community resolution is to be used', e.g. a written apology to the victim (Home Office, 2014: 12). Victims should be invited to choose what they think the most appropriate action in each case should be (Home Office, 2014).

As far as the Community Trigger is concerned, its main objective is to enable victims to initiate an investigation into a potential incident of ASB (Home Office, 2014).

[17] Crime and Disorder Act 1998 section 28.

[18] This is currently the approach adopted when hate crimes and incidents are reported to the police (College of Policing, 2014). If the victim believes that the crime/incident reported was motivated by racial hostility, then the police will record this as a hate crime/incident.

This, according to the Home Office (2012: 3), will 'compel agencies to respond to ASB' and address what really matters to their community whilst enabling victims to actively engage with local ASB strategies.

At first glance, a victim-oriented approach in this context appears to provide local communities with the necessary flexibility needed to address what really affects the vitims' lives and have their voices heard. For Duggan and Heap (2014), the adoption of a victim-oriented approach is not a panacea to ASB and low-level criminality. Rather, as they rightly point out, such an approach can result in the introduction of more punitive legislation in the name of victim protection (Duggan & Heap, 2014). This can be attributed to the phenomenon of penal populism and its potential adverse effects on crime policies. For Garland (2001: 142), what is problematic about this phenomenon is that 'policy measures are constructed in ways that privilege public opinion over the views of criminal justice experts and professional elites'. The reason for this lies with politicians' desire to gain public support, something which it is often achieved through populist statements, such as the 'tough on crime and tough on the causes of crime' (Blair, 1999), and often leads to the adoption of a more punitive approach towards crime, e.g lengthier custodial sentences (Garland, 2001). As Ericson (2007) explains, in contemporary Western societies criminalisation is risk-driven. Imaginary risks are overemphasised by politicians in order to create a sense of uncertainty and insecurity amongst the public (Ericson, 2007). As a result of this sense of uncertainty and insecurity, society is more eager to accept less liberty for greater security (Simon, 2007).

Although the adoption of a more punitive approach is not always based on expert evidence, it is often justified on the basis that this in line with what victims and the general public demand (Garland, 2001). As Duggan and Heap (2014: 34) contend, the underlying rationale for meeting society's expectations lies in the inability of the state to 'guarantee the prevention of crime … [and for this reason politicians] might instead seek to address (or deflect some of the responsibility for) existing victims' expectations, experiences and needs'. As Garland (2001: 143) explains, however, 'the voice [victims] are given is not necessarily theirs [since they have] been carefully stage-managed to ensure that it fits the political message of which it now forms a part'.

What can be problematic about the adoption of a victim-oriented approach in the context of ASB is that victims and their alleged opinion/demands can be used by local

politicians and enforcement agents as an excuse for the adoption of a more punitive stance towards low-level criminality and ASB. This more punitive approach can be, for example, in the form of tougher restrictions on the liberty of those against whom an injunction or a CBO is issued. As part of this more punitive approach, the scope of the ASB measures can be extended to behaviour which goes well beyond what was originally intended by the legislature expanding the net of social control 'potentially "'all spheres of life'" (Stephen, 2008: 321-322).

The above is not to suggest that a victim-oriented approach will inevitably result in the adoption of a more punitive stance towards low-level criminality and ASB. Rather, it is to reiterate that the officially stated objectives of the Government and the label attached to a particular legal rule by the legislature should not automatically determine whether the rule in question is criminal or non-criminal. The introduction and implementation of a victim-oriented strategy should not be used as a Trojan horse for *indirect* and/or unwarranted criminalisation. Although the injunction has been presented by the legislature as a purely civil measure which aims to prevent ASB via the adoption of a victim-oriented approach, it is still necessary to examine whether its implementation amounts to a form criminalisation regardless of its officially stated objectives. The label attached is indicative of the legislature's intentions with regard to the legal rule in question, but the main criterion should be how this legal rule has been implemented in practice and whether this led to the criminalisation of certain kinds of behaviour. [19] This is not to undermine the importance of the legislature's intentions. These can be further scrutinised at a later stage during the theoretical critique of the injunction's first limb especially if there is evidence to suggest that this has been operating as a *de facto* criminal measure.

4.2.2 Applying the working definition of criminalisation

At a theoretical level, we can investigate whether the injunction's first limb has been operating as a *de facto* criminal measure by analysing the relevant statutory provisions in light of the working definition of criminalisation formulated in chapter 3. To reiterate it here, in order for a legal sanction to amount to criminal punishment and thus constitute a form of criminalisation it must:

(i) Restrict the perpetrator's liberty; and

[19] See Figure 3.1.

(ii) It must publically and purposefully communicate censure to society.

To facilitate my analysis, I will rely on the following two hypotheticals. **A**, Andrew and his friends live at the outskirts of the town, but during the weekends they tend to meet at a particular park in the town centre where they get drunk and use abusive language towards other members of the public. **B**, Sam, who is an alcoholic, tends to congregate with a number of rough sleepers in the town centre. During weekends, Sam and his friends tend to get drunk and use abusive language towards other members of the public.

4.2.2.1 Restrictions on liberty

In order for the first prerequisite of the working definition of criminalisation to be satisfied, it must be proven that the legal rule at stake allows for the imposition of restrictions on the perpetrator's liberty. Liberty, in this context, is to be interpreted as a set of basic and/or fundamental freedoms to which every individual in this jurisdiction is entitled to through the HRA 1998.[20] These freedoms include amongst others, freedom of movement, freedom of expression, the right to enjoy our property and every other right and freedom guaranteed through the HRA 1998.

As discussed earlier, under the 2014 Act both positive and negative obligations can be imposed on those who behave in an anti-social manner.[21] To illustrate how this can be used in practice, let us revisit the above hypotheticals. Suppose that local enforcement agents successfully applied for the issue of an injunction against both Andrew and Sam. The court has decided that both of them should be prohibited from being drunk in a public space and from using abusive language towards other members of the public. Andrew has also been prohibited from visiting the park where he tends to meet with his friends, whilst Sam is prohibited from entering the entire town centre. In addition to these negative obligations, the court has decided that a positive obligation should also be imposed on Sam in order to attend an alcohol-related treatment. As part of his treatment, Sam is required to attend lengthy daily sessions for four months with a specialist in late afternoon at his local alcohol rehabilitation centre. For the court, this is the only way to permanently address Sam's behaviour.

What is important for the purposes of our analysis here is whether the restrictions/obligations imposed on Andrew and Sam can satisfy the first prerequisite of

[20] See 3.2.1.
[21] See 4.1.2.

the working definition of criminalisation. As far as Andrew is concerned, he can claim that there has been an interference with his liberty, since he is not allowed to enter that particular park. This can satisfy the first prerequisite of the working definition since this negative obligation interferes with Andrew's freedom of movement under Article 5 of the ECHR. As noted earlier, the interference with one's liberty needs not be significant in order to satisfy the first prerequisite.[22] Mere interference with one's ability to move freely in places which are open to the rest of the public would be sufficient in this context. Using abusive language towards other members of the public though can hardly qualify as a basic and/or fundamental freedom since no such freedom is guaranteed through the HRA 1998.

Although this may appear to extend the reach of the working definition of criminalisation too far, it should be remembered that both prerequisites must be satisfied in order for the restriction imposed on Andrew to amount to criminal punishment. The working definition formulated in chapter 3 purposefully avoids the imposition of a severity threshold that each restriction must meet in order for the first prerequisite to be satisfied.[23] This was attributed to the need to avoid any unnecessary ambiguities as to what qualifies as a severe interference with someone's liberty. This omission allows us to move beyond paradigmatic forms of criminal punishment, such as imprisonment, and include into our assessment alternative forms of legal sanctions, such as the imposition of exclusion zones similar to the one imposed on Andrew.

As far as Sam is concerned, he cannot argue either that using abusive language towards other members of the public constitutes a basic and/or fundamental freedom. His exclusion, however, from the entire town centre satisfies the first prerequisite of the working definition of criminalisation as this interferes with his freedom of movement, as per Article 5 of the Convention. Moreover, due to his exclusion from the town centre, Sam can argue that he is unable to associate with his friends who live in that area, potentially breaching Article 11 of the Convention.

In relation to the positive obligation imposed on Sam, it is again necessary to examine the impact that the injunction will have on Sam's liberty and whether compulsory attendance to this treatment interferes with one of his fundamental freedoms

[22] See 3.2.1.
[23] See 3.2.1.

and rights. At first glance, it is evident from the facts in scenario **B** that these positive obligations will have a significant impact on Sam's life. Sam, for instance, will be unable to spend time with his daughter (or anyone else) because he has to spend his afternoons at the local alcohol rehabilitation centre. Although in this case the imposition of this positive obligation aims to address the underlying causes of Sam's ASB, it also interferes with Sam's freedom to enjoy his 'private and family life' (Article 8 of the Convention). Again, it should be remembered that the objective of this positive obligation can assist our theoretical evaluation of the sanction imposed, but it cannot really assist us to determine whether this sanction constitutes a form of criminal punishment. In this case, the imposition of a positive obligation which amounts to criminal punishment can be criticised for undermining Sam's individual autonomy. As Ashworth and Horder (2013: 25) point out, if individual 'autonomy is to be respected, the State should leave individuals to decide for themselves and should not take decisions "in their best interests"'.

As far as the second limb of the injunction is concerned, although this does not fall within the remit of this study it is instructive to investigate if its implementation can also result in the imposition of restrictions on the perpetrators' liberty. As mentioned earlier,[24] breach of the injunction does not constitute an offence, but being in contempt of court carries a maximum penalty of two years imprisonment and an unlimited fine (Home Office, 2014). This is not to suggest that those who are found in breach of their injunctions are going to receive the maximum penalty available. As the Court of Appeal held in *Turnbell [2003] EWCA Civ. 1327*, the imposition of the maximum penalty in cases where the defendant has been found in contempt of court 'should be reserved for the worst cases' (para. 30). Evidence suggests that the vast majority of those who breached their ASBOs received a custodial sentence of less than six months (Home Office & Ministry of Justice, 2014b). A similar approach appears to be followed under the new legal framework. As a number of recent cases illustrate, those found in breach of their injunctions tend to receive a custodial sentence of no longer than three months.[25]

The above discussion illustrates that despite the shift to a purely civil measure, breach of the injunction can still result in the imposition of a lengthy custodial sentence.[26] Although in the context of the criminal law imprisonment remains a paradigmatic form

[24] See 4.1.2.
[25] See, for example: London Borough of Tower Hamlets v Tanbir Hussain (Case No: C00BO096).
[26] It is for this reason that it has to be proven beyond any reasonable doubt that the defendant has breached one of the terms of their injunction in order to be found in contempt of court (Home Office, 2014).

of punishment, we still need to be mindful of how other legal sanctions can interfere with the perpetrators' liberty. Imposing a custodial sentence on Sam and Andrew for breaching their injunctions would clearly satisfy the first prerequisite of the working definition. Similarly, the imposition of a fine would constitute an interference with their right to enjoy their property and thus satisfy the first prerequisite of the working definition of criminalisation as well (Article 1 of the First Protocol of the ECHR).

It follows from the above theoretical analysis of how the injunction can be implemented in practice that despite its civil nature there is clearly a potential for it to be implemented in a manner that would satisfy the first prerequisite of this thesis' working definition of criminalisation. In theory, it is possible for the restrictions/obligations imposed on those who behave in an anti-social manner to amount to criminal punishment. In practice, of course, this working definition requires a case-by-case analysis of the restrictions/obligations imposed on the perpetrators in order to determine whether they interfere with their liberty. Moreover, the above discussion highlights the significant degree of discretion given by the relevant statutory provisions to local enforcement agents and the courts as to the nature and extent of the restrictions and/or obligations that can be imposed on those against whom the injunction is used.

#### 4.2.2.2 To communicate censure

The restrictions/obligations imposed on Andrew and Sam will only amount to criminal punishment if both prerequisites of the working definition are satisfied. It is, therefore, essential to investigate whether the implementation of the injunction's first limb can purposefully result in the public denunciation of both Andrew and Sam. Failure to satisfy both prerequisites will result in the classification of these restrictions/obligations as mere "sanctions" that interfere with the perpetrators' liberty.

As far as the first limb of the injunction is concerned, our analysis should start with the ASBO and the concerns raised under the old scheme regarding the way it purposefully communicated censure, stigmatising those individuals against whom such an order was issued. One of the main criticisms raised against the implementation of the ASBO related to the 'naming and shaming' practices followed in certain areas by local practitioners and the police.[27] One of the most illustrative examples was the 'wall of

[27] See, for instance, the concerns expressed by a number of legal commentators and non-governmental organisations to the Home Affairs Committee (2005) regarding the 'naming and shaming' practices used by certain local authorities.

shame' in Guildford where pictures and information about those who received an ASBO were posted 'for public information' (Squires & Stephen, 2005a: 523). Although the publication of certain information about those against whom an ASBO was issued could facilitate the better policing of the orders and the reintegration of the perpetrators to the community, the 'naming and shaming' practices used by local enforcement agents led to a 'campaign of vilification' which resulted in the further isolation of those who were 'already excluded' (Squires & Stephen, 2005a: 523).

The practice of publicising the recipients' personal details was challenged in *R. (on the application of Stanley) v Commissioner of Police of the Metropolis [2004] EWHC 2229*. In this case the claimants, who were young and had a long history of violence and ASB (para. 3), sought a judicial review of their local CSP's decision to distribute 'leaflets and publicise other materials' which contained their pictures and other personal information following the issue of ASBOs against them. [28] Although proceedings for the issue of these ASBOs have been covered extensively by local and national press (para. 16), according to the claimants, the publication of this information by their local CSP was unlawful and in breach of their right to 'private and family life' under Article 8 of the ECHR (para. 1).

The defendants submitted that it was not their intention to punish or victimise the claimants and they sought to justify the publication of this information on three grounds: (1) 'to restore public confidence, (2) to assist in enforcing the ASBOs, and (3) to deter others and maintain peace in the community' (para. 31). In dismissing the claimants' application, the trial judge held that although colourful language was issued against the claimants, the publication of this information was *necessary* for the enforcement of the orders (para. 40). It was, therefore, acknowledged that local residents should have been informed about the identity of the claimants and the restrictions imposed on them in order to be able to identify and report any possible violations of the orders. Nevertheless, the trial judge highlighted the need for 'publicity [to be] confined to what is reasonable and proportionate' (para. 42).

In effect, the decision in *Stanley* was echoed by the Home Office's (2005) guidance on publicising ASBOs which explicitly stated that the main objective of this

[28] 'Other materials' included information publicised on the CSP's website concerning the claimants. The leaflets were distributed in the exclusion zone included in the ASBOs issued against them (para. 1).

practice is the prevention of further ASB rather than to punish those against whom an order was issued. According to the Home Office (2005), the publication of certain information was an essential tool for local enforcement agents against ASB since the ASBOs could only be effective if those affected by this behaviour were made aware of the terms of the orders. It has also been argued that the publication of certain information would deter others in the future from behaving in a similar way (Home Office, 2003: 50-51).

A similar approach regarding the publication of the perpetrators' details has also been adopted by the 2014 Act. As explained in the Statutory Guidance, informing the public about the issue of an injunction is vital in terms of both enforcement and heightening the public's confidence in local enforcement agencies (Home Office, 2014). Moreover, similar to the pre-2014 era, it is for the local authorities and the police to decide whether the recipient's details should be publicised (Home Office, 2014). For cases involving young persons, section 39 of the 2014 Act gives the court examining an application for the issue of an injunction 'the discretion to restrict the publication of certain information in order to protect the identity of the child or young person, for example: his or her name, address, school, etc.' (House of Commons, 2013: para. 123).

Though the effectiveness of the injunction depends largely on public involvement, it can be asserted that publicising the perpetrators' pictures and personal information can under certain circumstances result in their social reprobation, especially in cases involving young persons. Similar to those found guilty of an offence, members of the public are likely to view those against whom an injunction has been issued as moral wrongdoers who are worthy of reprobation.[29] Simply put, members of the public can perceive the publication of this information as an invitation by the state and its agents to condemn both the perpetrators and their behaviour. This will inevitably result in the stigmatisation of the perpetrators and possibly to their social ostracisation (Squires & Stephen, 2005a).

In a recent study conducted by Matthews et al (2007) with ASBO recipients and their families, there was evidence to suggest that the 'naming and shaming' practices used by some local enforcement agents and the increased media attention led to the stigmatisation of a perpetrator's entire family. As one of the interviewees noted in that

[29] See 2.1.

study, that after receiving an ASBO he/she was constantly accused by the local community and the police for various offences he/she had not actually committed (Matthews et al, 2007). Furthermore, after the implementation of the orders many of the ASBO recipients noted that they struggled with employment and accommodation (Matthews et al, 2007).

The potentially stigmatising effects of ASBOs can be attributed directly to the 'naming and shaming' of the perpetrators. In *Stanley*, the relevant CSP did not only publicise the pictures and the personal details of the claimants, but they also decided to use colourful language against them in order to highlight the severity and blameworthiness of their actions. For instance, on the CSP's website which was widely accessible by all members of the public, the claimants were 'described as thugs and bully boys engaging in animalistic behaviour' (para. 24). This was not a mere appeal for information in case there was a breach of the ASBOs issued against these young individuals. Instead, the wording used and the extensive publication of these materials suggest that the CPS (i.e. state actors) *publically* and *purposefully* sought to censure the claimants for their behaviour.

The pressing question here is whether the mere publication of certain information regarding both the perpetrators and the restrictions imposed on them would automatically satisfy the second prerequisite of the working definition of criminalisation. The fact that some 'naming and shaming' practices have been used as a means of deterrence or to inform the public about an order does not necessarily mean that these were not also used to purposefully condemn the perpetrators for their behaviour. This is not to dispute the need to inform those immediately affected by ASB about the restrictions imposed on the perpetrators. Rather, it is to argue that if this process of informing the public aimed at *purposeful* communication of censure, then the second prerequisite of the working definition will be satisfied. Similar to what has already been said about the label attached to each legal rule, the officially stated objectives of local enforcement agents can be used to evaluate these interventions.[30]

As with *Stanley*, the starting point is to examine the language used by local enforcement agents. The use of colourful language, for instance, against the perpetrators would clearly satisfy the second prerequisite since the purpose of publicity is not just to

[30] See 4.2.1.

inform the public about the perpetrator's behaviour, but is to publically condemn them for their behaviour. Moreover, as part of our investigation we can also scrutinise the extent of this 'naming' and whether its underlying objective is to facilitate enforcement or to communicate censure. To illustrate this, let us revisit scenario **A**. Suppose that after the issue of the injunction against Andrew, his local CSP has decided to hold a press conference and distribute leaflets across the entire town which contained information about the restrictions imposed on Andrew along with a picture of him. According to the CSP, the extensive publicity has been deemed necessary to facilitate the enforcement of the injunction. Andrew's behaviour, however, affected only a very small part of the community, those who used or lived nearby the park. Informing the entire community about Andrew's behaviour appears to be a rather disproportionate response. In this case, the *purpose* of this extensive publicity is not only to facilitate the effective policing of the injunction, but it is also to *publically* condemn Andrew. Such a scenario could potentially satisfy the second prerequisite of the working definition of criminalisation and the restriction imposed on Andrew would have constituted criminal punishment.

Suppose now that instead of informing the entire local community, the CSP has decided only to inform local enforcement agents and those who had been affected by Andrew's behaviour. Clearly, in latter scenario, the purpose of sharing information is to facilitate the effective policing of the injunction, rather than to publically condemn Andrew. It is less likely that this case would satisfy the second prerequisite of the working definition of criminalisation. Similarly, if Andrew was publically condemned through local media's actions, rather than through the actions of state actors, such as local enforcement agents, then this would also be unlikely to satisfy the second prerequisite of the working definition of criminalisation. In order for the second prerequisite to be satisfied, it is essential for state actors to *publically* and *purposefully* condemn Andrew through the implementation of the injunction.

As far as the second limb of this two-step regulatory process is concerned, it is important to reiterate that breach of the injunction does not constitute a criminal offence. Consequently, our analysis should focus again on the nature of the sanctions imposed on those who are found in contempt of court and whether through this process the perpetrators are publically and purposefully condemned for their behaviour. Similar to the first limb of the injunction, if both prerequisites of the working definition of

criminalisation are satisfied, then the sanction imposed would amount to criminal punishment.

It is clear from the above theoretical analysis that despite the repeal and replacement of the ASBO, it is possible for the injunction to be implemented in a manner that would satisfy both prerequisites of this thesis's working definition of criminalisation. What is also evident through the above theoretical examination of the injunction, is the significant degree of discretion granted by the 2014 Act to local enforcement agents regarding not only the scope of the law in this area, but also regarding the nature and extent of the restrictions and/or obligations that can be imposed on those against whom these measures are used. In effect, what this means is that the implementation of the injunction can vary considerably from one area to another depending on how local enforcement agents decide to utilise the discretion granted to them. This reiterates the need to examine the implementation of the injunction's first limb empirically and investigate whether this has led to the creation of localised criminal codes (the third research question of this thesis).

**Conclusion**

This chapter began by scrutinising the current law on ASB through a critical evaluation of the most important changes introduced under the 2014 Act. Although the ASBO has been replaced by a purely civil injunction, it is evident through the analysis of the relevant legislation that the injunction's first limb is potentially more restrictive than the first limb of the ASBO. The main reason for this is that the 2014 Act allows for the imposition of both negative and positive obligations on those against whom an injunction is issued. This has led to the conclusion that despite the repeal and replacement of the ASBO it is essential to investigate if, in theory, the restrictions and/or obligations imposed on those subjected to the injunction can amount to criminal punishment.

The second part of this chapter examined how the injunction might be implemented in practice, with reference to the working definition of criminalisation formulated in chapter 3. The close examination of the injunction, as this appears on the statute book, revealed that it is possible for this measure to be implemented in a manner that would satisfy both prerequisites of the working definition of criminalisation. Although at a theoretical level this appears to be possible, it has been noted during the analysis of the injunction that the implementation of the ASB measures can vary

significantly across England and Wales primarily due to the significant degree of discretion granted to local enforcement agents.

The theoretical analysis of the injunction and the possibility of criminalising *indirectly* certain kinds of behaviour through its implementation, reiterates the need to examine empirically how the injunction's first limb has been used by local enforcement agents. The data collected through this empirical study, can be then examined in light of the working definition of criminalisation formulated in chapter 3 in order to determine whether the injunction should be regarded as a criminal measure. If there is evidence to suggest that indeed the injunction has been operating as a *de facto* criminal rule, then it is necessary for criminal law theorists to subject it to the same theoretical critique as criminal offences.

# Chapter 5: Implementing anti-social behaviour policies at ground level

This chapter presents the findings of an empirical study conducted with local practitioners and police officers in two counties in England regarding the implementation of the injunction's first limb. Central to this study has been the need to examine whether the implementation of the injunction's first limb has led to the indirect criminalisation of certain kinds of behaviour. This investigation has provided the basis for examining whether localised criminal codes have been created through the use of the injunction.

This chapter is divided into two parts. The chapter begins by providing a brief summary of the methodology adopted and elaborates on the scope and limitations of this research project. The second part presents the findings of this research which are based on four pillars:

(i) the way ASB has been conceptualised at a local level;

(ii) the implementation of the 2014 amendments;

(iii) the procedure followed by local enforcement agents when dealing with a potential incident of ASB; and

(iv) the nature of the sanctions imposed on those against whom these measures have been used.

## 5.1 The scope of this study

Before presenting the empirical findings of this study it is imperative to elaborate on its scope, its limitations and its contribution to the academic debates on criminalisation and ASB. The importance of this task lies with the rich pre-existing academic literature on the ASB tools and powers, especially at a theoretical level.[1] The initial decision to tackle ASB through a hybrid method of social control, for instance, was criticised by a number of academics, such as Duff (2010) and Ashworth and Zedner (2010), who argued that the ASBO was guilty of blurring the normative distinction between the criminal and the civil law. Other critics of the ASBO, such as Cornford (2012: 3), focused on the alleged over-inclusiveness of ASB's statutory definition and the possibility of extending the reach of

[1] See 'Anti-social behaviour in England and Wales' and 4.1.1.

social control to behaviour which is ‘merely offensive’ and/or to ‘minor infractions commonly associated with young people’ (Lewis, Crawford, & Traynor, 2016).

At an empirical level, a number of small-scale studies have already been conducted focusing on specific aspects of the ASBO and related measures. Bullock and Jones (2004), for instance, scrutinised the use of the ABCs in the London Borough of Islington. According to their findings, although forty-three per cent of the ABCs signed in Islington had been breached, this method of informal intervention had been very successful with many young people (Bullock & Jones, 2004). Based on their findings, there was a significant reduction in the levels of ASB committed by those who signed an ABC (Bullock & Jones, 2004).

In another study conducted by Koffman (2006: 599), the main objective was to examine empirically whether the ‘ASBO and other measures’ used by local enforcement agents in East Brighton targeted particular social groups, such as young people. Based on his findings, eighty per cent of the ASBOs in this area were issued to people aged twenty or below (Koffman, 2006: 599-600). Nonetheless, in most of the cases the ASBO was reserved for the most prolific perpetrators rather than as a first resort measures against ASB (Koffman, 2006: 600). An equally important finding of this study was that the ASBO was used on many occasions to address behaviour which was already proscribed by criminal law (Koffman, 2006: 601).

In another small-scale study, Matthews et al (2007) focused on the use of the ASBO and its impact on the perpetrators, the victims and local communities. This study found that the issue of the order had different impacts on those against whom it was issued in terms of their future behaviour (Matthews et al., 2007). Whilst some of them viewed the issue of an ASBO as a ‘wake-up call’, others perceived the ASBO as a ‘weaker alternative’ to prosecution (Matthews et al., 2007: 33-34). This study also revealed that the issue of an ASBO had a significant societal effect on both the perpetrators and their families. Evidence from this study suggests that both the perpetrators and their families were stigmatised by the rest of society (Matthews et al., 2007). The researchers also found an increased reliance by local enforcement agents on the CrASBO, rather than on the ASBO (Matthews et al., 2007).

In a study published in 2010, Donoghue (2010: 88) examined the administration of both the ASBO and the CrASBO across Britain from a socio-legal perspective focusing

on how due process considerations and 'judicial power and discretion intersect[ed] to shape' the implementation of these measures. One of the most important findings of this study was that many members of the judiciary were concerned about the fact that they could only impose negative obligations on those against whom an ASBO or a CrASBO was to be issued (Donoghue, 2010). According to her findings, there was evidence to suggest that on many occasions judges were aware of the underlying causes of the perpetrator's behaviour, such as alcohol and drug addiction, and that the imposition of bland prohibitions could not permanently address the behaviour at stake (Donoghue, 2010). This study also found a lack of co-operation amongst the various local enforcement agents (Donoghue, 2010).

Finally, the findings of a large-scale research study conducted by Crawford, Lewis, and Traynor (2016) were recently published. This latter study was conducted in four different sites in England between 2008 to 2012 and examined 'the use of formal ASB warning letters, ABCs and ASBOs and the interrelations between these tools and the wider preventive and support services allied to them'.[2] Based on their findings, the use of the abovementioned measures in the sites under investigation was in contrast with their preventive nature since those against whom these measures had been used had 'already engaged in serious or persistent offending' (Lewis, Crawford & Traynor, 2016: 8). Moreover, although this study confirmed the existence of 'a pyramidal system of regulation' with regards to the administration of ASB, it found that in each site there were 'myriad variations' in terms of 'the numbers of tiers in the pyramidal structure' (Lewis, Crawford & Traynor, 2016: 9).

This study examined the implementation of the new legal framework across two counties in England. As part of this project, twenty-nine interviews were conducted with local practitioners and police officers who had an everyday interaction with ASB and had been responsible for the implementation of the relevant tools and powers. In particular, nineteen interviews were conducted in Site A (ten with local practitioners and nine with police officers) and ten in Site B (six with local practitioners and four with police officers).[3]

[2] The findings of this study were presented in two different journal articles (Crawford, Lewis, & Traynor, 2016: 6; Lewis, Crawford, & Traynor, 2016).
[3] For a more detailed account of the methodology adopted see 1.4.

The contribution of this empirical study to the current academic literature on ASB and criminalisation is twofold. First, in contrast to the above empirical studies, which focused on the pre-2014 tools and powers, this is the first empirical data collected (that I am aware of) on the 2014 amendments. This empirical study provides an insight into how ASB is managed and addressed after the repeal and replacement of the ASBO and explores how local enforcement agents have utilised positive obligations.[4] It should be borne in mind that the use of these measures can vary considerably from one area to another due to the extensive discretion afforded to local enforcements agents regarding both the scope of the law in this area and the nature of the sanctions that can be imposed on those who behave in an anti-social manner.[5] Thus, it is necessary to approach the findings of this study with caution since they might not be representative of how the ASB tools and powers have been implemented across the country. Rather, they are only representative of the two sites under study.

Secondly, it is important to bear in mind that the implementation of the 2014 amendments and of the ASB legal framework in general are examined through the lenses of indirect criminalisation and in light of the working definition of criminalisation formulated in chapter 3. Although at a theoretical level the ASBO's first limb has been criticised for allowing for the indirect criminalisation of a wide range of behaviour, this is the first study that examines empirically the validity of this claim. The importance of this examination is heightened by the earlier theoretical analysis of both indirect and under-criminalisation.[6]

### 5.2 Research findings

The prime objective of this research project has been to examine whether localised criminal codes have been created through the implementation of the injunction's first limb. To achieve this, I first had to illustrate the importance of this task by emphasising the need to maintain the moral distinction between criminalisation and other forms of social regulation (the first research question). I then formulated a working definition of criminalisation which identifies the conditions that must be met in order for a legal sanction to amount to criminal punishment and thus constitute a form of criminalisation

[4] As mentioned in 4.2.1, under the 2014 Act a number of other tools and powers have been introduced as well, such as the Community Remedy and the Community Trigger. These measures are beyond the reach of this study. See 'Research objectives'.
[5] See 4.2.2.
[6] See 'The pre-2014 approach to anti-social behaviour' and 2.1.

regardless of the label attached to the legal rule in question (the second research question). To reiterate it here, a legal sanction amounts to criminal punishment if:

(i) it interferes or threatens to interfere with the perpetrator's liberty; and

(ii) if it publically and purposefully condemns the perpetrator.[7]

The interviews conducted with local enforcement agents were structured in four pillars all of which related to the primary research question. The findings of this study are presented according to these pillars. The first pillar relates to the kinds of conduct labelled as anti-social by local enforcement agents and thus addressed through the use of these measures. It also scrutinises the basis upon which a particular kind of behaviour has been classified as anti-social. If there is indeed evidence to suggest that the implementation of the injunction led to the indirect criminalisation of certain kinds of behaviour, it is imperative to scrutinise the kinds of behaviour criminalised.

The second pillar focuses on the 2014 amendments in legislation and how these have affected the administration of ASB at a local level. The main focus of this pillar is the move from the hybrid ASBO towards a civil injunction. An equally important task of this pillar was to investigate the introduction of positive obligations and what impact this might have on those against whom the injunction is used.

The third pillar relates to the procedure followed prior to and after the issue of an injunction. It excludes, however, the procedure followed after someone was taken back to court for breaching the injunction issued against him. As discussed earlier, the main objective of this study is to investigate whether the restrictions imposed on those against whom an injunction is issued (the first limb of the injunction) constitute a form of criminalisation in their own right.

The final pillar focuses on the nature of the restrictions imposed on those against whom an injunction has been issued. The findings from this pillar will then be examined in light of the working definition of criminalisation formulated in chapter 3 in order to determine whether the sanctions imposed through the injunction's first limb constitute a form of criminal punishment. This pillar will provide the basis for addressing the primary research question of this thesis.

[7] See 3.2.

5.2.1 First Pillar: What are the true limits of anti-social behaviour?

One of the most concerning features of the pre-2014 legal framework was the statutory definition of ASB which, according to its critics, expanded the net of social control to everyday 'trivial, sub-criminal, or nuisance behaviour' (Koffman, 2006: 611-612). As noted earlier, this can be attributed to the fact that the statutory definition of ASB focused on the actual and/or potential impact of someone's behaviour on others rather than on the actual nature of the wrong committed.[8] The Government sought to defend the broad drafting of the statutory definition on the basis that each local community faces its own problems and they should be allowed a certain magnitude of discretion in order to be able to address what really matters to them (Home Office, 2011b).

Under the current statutory definition, ASB ranges from conduct which causes mere 'nuisance and annoyance' to behaviour that causes 'harassment, alarm or distress'.[9] The flexibility of the statutory definition is further evidenced by the fact that the 2014 Act has retained the 'caused or likely to cause' clause. This enables local enforcement agents to adopt a proactive approach by 'highlight[ing] to [suspected perpetrators] that if they continue or escalate their behaviour what action can be taken' against them (Int.17 (LP) Site B).

The ambiguous limits of the statutory definition were confirmed when research participants were asked about how they would personally define ASB. In both sites, the majority of the participants felt that it was quite difficult to conceptualise ASB precisely or provide examples of behaviour that would definitely fall within the ambit of the statutory definition. As one police officer noted 'almost everything fits under the ASB legislation' (Int.12 (PO) Site B). This was further evident by the participants' responses when asked to provide some examples of behaviour that could possibly be regarded as anti-social in their own localities. It was clear from the examples provided that ASB could range from behaviour which at the face of it appears to be part of everyday life to conduct which is already proscribed by criminal law. As a local practitioner noted:

> There are a lot of types of behaviour that we do not like or as a society we say are unacceptable such as noise, nuisance, it could be drug dealing for some people, substance abuse for other people who find it quite upsetting and anti-social (Int.4 (LP) Site A).

[8] See 'Conceptualising anti-social behaviour under the current law'.
[9] Section 2 of the 2014 Act.

This statement also highlights the subjective nature of ASB. What can be regarded as anti-social by one person might be ignored as harmless behaviour by another.

As far as the lower end of the spectrum is concerned, it was clear that ASB covers primarily behaviour which appears to be part of everyday social interaction and not directly regulated by law, such as 'drinking [alcohol and] … being loud' whilst being in a public place (Int.3 (LP) Site A). Although consuming alcohol in a public space is not prohibited by law,[10] local enforcement agencies can seek to prevent people from doing this if it leads to ASB (Woodhouse & Ward, 2015). As Woodhouse and Ward (2015) explain, local enforcement agents can use, for instance, a Public Space Protection Order to prohibit the consumption of alcohol in a particular area if they deem this as one of the underlying causes of ASB.[11] Although the use of the 2014 Act as a means of regulating otherwise legal activities appears to be contentious,[12] it is clear that the ASB provisions provide a further flexible tool to local enforcement agents since these measures do not require the formalities of direct criminalisation.

5.2.1.1. Impact and persistence

At first sight, using the ASB tools and powers to address street drinking, can be criticised for widening the net of social control to what is otherwise a lawful activity. However, as fifty-five per cent of the interviewees noted, the regulation of otherwise legally permissible activities through these measures can be attributed to the *impact* that these activities had on others, as against the actual nature of the conduct in question. Several interviewees highlighted the fact that while some activities appear, in isolation, to be of a trivial nature, their cumulative effect on people's lives can in fact be devastating. On many occasions, ASB 'will determine where people want to live, it will determine their friendships, their family [and] it can put strains on relationships' (Int.16 (LP) Site A). Moreover, as the case of Fiona Pilkington illustrates, victims of prolonged ASB 'have gone on to commit suicide because they felt that what they were reporting had no impact and they were dismissed' (Int.4 (LP) Site A).

[10] Being disorder in a public space whilst drunk constitutes an offence under section 91 of the Criminal Justice Act 1967.

[11] Under section 58 of the 2014 Act a local authority can issue such an order as a means of addressing or preventing a certain kind of behaviour in a public space which has or is likely to have a 'detrimental effect on the quality of life of those in the locality'. Breach of the order or failure to comply with the requirements of an order constitutes an offence under section 67 and can result in the issue of a fixed penalty notice (section 68 of the 2014 Act).

[12] See 'The pre-2014 approach to anti-social behaviour'.

Although 'there [was] no specific number of incidents' (Int.19 (PO) Site A) required in order for local enforcement agents to classify someone's behaviour as anti-social, it was clear from the data collected that either the perpetrator's behaviour must have a significant effect on victims' lives 'over a period of time' (Int.24 (LP) Site A) or that its impact had been so severe that immediate action was needed. As one of the participants put it:

> We are going to review [each incident] and if we think that it is too high or has been going on for a long time and nothing that we have done seems to have worked…we will then look at enforcement (Int.19 (PO) Site A).[13]

The above testimonies suggested that the key factor that is considered when determining whether something is classified as ASB is the actual or potential impact on others, which is often marked by persistent and repetitive conduct. This approach is in line with the Home Office's guidelines regarding the way ASB is to be conceptualised at a local level. According to these guidelines, 'the right response in each case will depend on a range of factors, but most importantly, on the needs of the victim and the impact the behaviour is having on their lives' (Home Office, 2012: para. 1.3).

5.2.1.2 Discretion and common sense

According to half of the interviewees, the focus on the impact that certain kinds of behaviour have on others also helps to explain the reason why similar activities can be treated differently (i.e. as non-anti-social) depending on the context in which they take place. One police officer explained:

> Having a house party where no one can hear it for three miles is not going to be anti-social. But if you put that same incident … in the middle of a town centre it is likely to cause harassment, alarm or distress ... So, same people doing the same thing, different locations, massively different impact (Int.26 (PO) Site A).

This need for a flexible legal framework was further evident when participants were asked about the 2014 amendments with regards to the way ASB is defined. Under the 2014 Act the definition of ASB has been extended in two ways. First, the consolidation of a number of instruments, such as the ASBI, into a single multi-purpose injunction has led to the expansion of ASB to behaviour that causes 'nuisance and annoyance' in a housing-related

[13] Most of the participants used the term 'enforcement' to describe the process of taking formal legal action against someone, such as applying for the issue of an injunction or of a CBO.

context (House of Commons, 2013). Secondly, under the 1998 Act ASB was defined as conduct which 'caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself'.[14] This was modified by the 2014 Act and now includes behaviour that 'causes or is likely to cause harassment, alarm or distress to any person'.[15]

As many of the participants noted, the 'same household as himself' clause caused ambiguities and 'grey areas' (Int.5 (LP) Site A) especially when the alleged incident of ASB took place in hostels and houses of multiple occupancies. The abolition of this clause was regarded as a positive development by most of the research participants who perceived this as a necessary amendment. According to one local practitioner 'it is broadening the net…the behaviour can be monitored wider' (Int.6 (LP) Site A).

The great magnitude of discretion afforded to enforcement agents regarding the way ASB is to be conceptualised at a local level conforms to the Government's promise for a new legal framework that will be capable of 'provid[ing] faster, more visible justice for victims and communities…and that act[s] as a real deterrent' (Home Office, 2012: 1). For the majority of the participants this flexibility in the statutory definition, particularly the 'likely to cause' clause, was vital for the protection of vulnerable victims since it enabled them to adopt a more proactive approach towards ASB. This allowed local enforcement agents to intervene at an early stage and 'stop [the perpetrators'] anti-social behaviour rather than leave them to escalate' (Int.6 (LP) Site A). According to a police officer 'by keeping "likely" to occur it gives us greater scope to assess cases and put measures if we need to protect those vulnerable members of community' (Int.12 (PO) Site B).

This does not necessarily mean that the police or local practitioners applied for the issue of an injunction in cases where someone's behaviour was only *likely* to cause 'harassment, alarm or distress'. To be used in this way would have constituted a significant and possibly unjustifiable expansion of the scope of the law in this area. Nevertheless, as Sanders and Young (2008: 281) explain, 'the importance of legal powers [given to the police] is not so much that they are *actually* invoked frequently, but that they could be' (emphasis in the original). On this view, what is important about the 'likely

[14] Section 1.
[15] Section 2(1)(a).

to cause' clause is not so much its actual implementation, but that it *can* be used by law enforcement agents at their own discretion when this is deemed necessary. Although, in both sites the local enforcement agents have not actually used the ASB tools and powers to regulate behaviour which did not actually cause any of the abovementioned negative experiences to other people, we still need to ensure that this will not happen in the future.

Although the majority of the participants held that a certain degree of flexibility is necessary when dealing with ASB, four interviewees (two from each site) highlighted the risks associated with the broad drafting of the statutory definition by characterising it as 'frighteningly subjective' (Int.8 (LP) Site B). According to one local practitioner:

> It is becoming potentially quite powerful for local authorities for addressing behaviours that they just decide they do not like…my concern for that it is that it could be used inappropriately and disproportionately against people who maybe do not have a voice, [such as] members of the street community (Int.4 (LP) Site A).

Another participant criticised the expansion of the statutory definition of ASB to behaviour that causes 'nuisance and annoyance'. As that local practitioner stated 'my concern is with the new tools and powers because there is a lower threshold and you might get that perfectly innocent activities' (Int.5 (LP) Site A). It was, therefore, acknowledged by some of the participants that these measures must be used with caution.[16]

5.2.1.3 Managing expectations

Some participants noted that the broad statutory definition of ASB created a lot of misconceptions amongst members of the public as to nature of the behaviour dealt with through these measures, something which had led to higher expectations as to what local enforcement agents can achieve through the implementation of the relevant tools and powers. Some interviewees, for example, noted that members of the public tend to perceive these measures as a 'panacea in solving their problems' (Int.17 (LP) Site B). Consequently, some members of the public believed that the scope of the law in this area should be extended in order to address what they personally believed to be anti-social. In theory, this can be further facilitated through the introduction of the Community Trigger which imposes an obligation on local enforcement agents to formulate a review procedure with regard to the public's complaints relating to ASB (Home Office, 2014).[17] This can

[16] I will elaborate further on the procedure followed in 5.2.3.
[17] For more on the Community Trigger see 4.2.1.

possibly put extra pressure on local enforcement agents to extend the net of social control to 'potentially "all spheres of life"' (Stephen, 2008: 321-322). These increased expectations do not only impose a higher burden on local enforcement agencies which have to administrate them, but they can also have a negative impact on society's tolerance level and interpersonal relationships. An expansion in the net of social control can encourage people to report/complain about behaviour which would have been previously ignored or considered to be part of everyday social interaction. The following testimony is a good illustration of the possible adverse consequences of these increased expectations:

> What we find is that we will get residents who report issues with their neighbours without having to address them themselves and as you know as soon as the landlord gets involved you can end up breaking up a relationship (Int.16 (LP) Site B).

As for the upper end of the spectrum, there was an overlap between ASB and behaviour that already constituted a criminal offence, such as drug dealing. Koffman (2006) contends that this overlap between the two can be attributed to the fact that a precise distinction between ASB and criminality cannot always be drawn. Koffman's conclusion is consistent with most of the participants' testimonies in this study. One of the participants pointed out:

> Although it is a crime it can also be anti-social behaviour… so it can be down to graffiti, words spoken, some of the stuff written on the walls can be either interpreted as hate crime or as directed anti-social behaviour, homophobic (Int.18 (PO) Site A).

Although 'using threatening or abusive words' can constitute an offence under section 5(1) of the 1986 Act, this kind of behaviour can also be regarded as anti-social if it is likely to cause 'harassment, alarm or distress' to both the victim and any other member of the community who witnessed it. Consequently, if the offender is found guilty of the section 5 offence, then the police, through the CPS, can apply for the issue of a CBO against that individual (Home Office, 2014).

The overlap between the two raises a number of issues for both local enforcement agents and criminal law theorists. The main issue raised here relates to the method of social control that must be used in order to address this kind of behaviour. The use of the injunction would constitute a form of *under-criminalisation* since criminal behaviour is

addressed through non-criminal measures.[18] For an advocate of the last resort approach, however, the use of the criminal law would be unwarranted if an alternative method of social control, such as the injunction, can adequately address the behaviour in question (Husak, 2004). Equally, if both methods of social control are used through the issue of a CBO, then this can be criticised as a disproportionate response to the wrong committed.[19] Moreover, this can potentially lead to the inconsistent application of the law where in some parts of the country a particular criminal wrong is dealt with through criminal prosecution whereas in other parts of the country is dealt with through the injunction.

The above testimonies suggest that the main factor determining whether someone's behaviour is to be classified as anti-social is its impact on other members of the community. The findings of this research also echo the findings of previous studies which revealed both an overlap between ASB and criminality and the possibility of regulating otherwise 'permissible legal activities' through the implementation of these measures (Lewis, Crawford & Traynor, 2016). This was an expected discovery primarily due to the way ASB is defined under section 2 of the 2014 Act. As discussed earlier, one of the main criticisms against ASB's statutory definition is its reliance on the impact or *likely* impact of someone's behaviour rather than on the nature of the conduct in question.[20] Nonetheless, it was evident from the data collected that the relevant tools and powers were only utilised in serious cases where the behaviour in question was impactful and most commonly repetitive.

The concerns raised above, therefore, regarding the expansion of the net of social control to 'all spheres of life' through the implementation of ASB tools and powers are not evidenced empirically. Rather, it was evident that local enforcement agents used the discretion granted to them in a sensible manner focusing only on behaviour that had a real impact on others. As discussed earlier, however, what is important about the powers granted to law enforcement agents is not always the way they are currently used. Instead, what really matters, according to Sanders and Young (2008), is the fact that these powers are available to them if they wish to invoke them. Although Sanders and Young (2008) are referring here to the ability of police officers to search people even without making use of the powers granted to them by law, their argument is readily applicable in the

[18] I will elaborate further on this issue in 6.2.2.
[19] I will return on the overlap between ASB and the criminal law in 5.2.4.1.
[20] See 'Conceptualising anti-social behaviour under the current law'.

context of the ASB tools and powers as well. Although in both sites ASB has not been conceptualised in an arbitrary manner, it is still necessary to formulate mechanisms through which we can ensure that changes in the implementation of these measures will not result in the expansion of the net of social control.[21]

5.2.1.4 Other relevant factors

Although it was evident that the main focus of local enforcement agents was the impact rather than the actual nature of a particular behaviour, there was evidence to suggest that their decisions tend to be informed by a number of other factors as well.

*(i) Focusing on victims and their experiences*

In Site A, there was strong evidence to suggest that victims' perceptions were central to the way ASB was conceptualised. It was evident from the data collected that if the complainant was negatively affected by someone's behaviour or if they deemed their behaviour as anti-social, then the investigation of this incident would start from the premise that it constituted ASB. The next testimony is illustrative of this victim-oriented approach adopted in Site A in terms of conceptualising ASB: 'it is a victim led, victim witness led process. When a victim reports us that they have felt harassment, alarm or distress then that very much informs whether we are going to take it on as a case' (Int.5 (LP) Site A). A similar approach was also adopted by the relevant police force. According to one of its members 'a common theme within policing is…that it is actually better to deal with something as it has been identified rather than to justify why it is not anti-social' (Int.28 (PO) Site A). For this reason, 'if there is a hate element to it then [the victim's] perception [of the behaviour in question] is really important because there is a perception that it is a hate incident. It is a hate ASB and then we will deal with it accordingly' (Int.29 (PO) Site A).

The above is not to suggest that local enforcement agencies structured their investigation and response solely on the alleged victim's perception of an incident in the absence of any other credible evidence. As one of the participants pointed out 'if we obtain evidence … that suggests otherwise we will then make adjustments to that' effect (Int.21 (PO) Site A). Instead, the above is to illustrate the importance attributed by these institutions to victims and the possible adverse consequences that persistent low-level

[21] See 6.1.

criminality and ASB can have on them. This is in line with the Government's promise to depart from the 'one size fits all' approach of the past (Home Office, 2012: 3). As the Home Office (2012: 3) explains, 'anti-social behaviour is a fundamentally local issue, one that looks and feels different in every area, in every neighbourhood and to every victim'. Accordingly, the views of the victims should not be dismissed outright since what might appear to be of trivial nature to local enforcement agents, can have a devastating effect on the complainant's life.

As far as Site B is concerned, three out of the ten participants from this site noted that they would take into consideration whether the alleged victim perceived a particular kind of behaviour as anti-social. However, the overall impression from this area was that a victim's perception of an incident would not affect significantly, or at least not to the extent that this did in Site A, the way local enforcement agents conceptualise ASB. As noted by a police officer 'if we are getting repeated calls about the same thing…we are going to look at it to determine [whether we] actually need to do something about it because there is a risk to the public' (Int.14 (PO) Site B).

From a victim's perspective, an approach similar to the one adopted in Site A, offers assurance to the complainants that their reports 'are taken seriously' by the authorities and that they are not going to be dismissed outright without any further investigation (Home Office, 2012). Moreover, as with 'hate crimes' (CPS, 2016), focusing on the alleged victim's perception of an incident can increase the public's confidence in law enforcement agencies, tackle under-reporting and ensure that equal protection is offered to every social group (College of Policing, 2014). Although the adoption of a more victim-oriented approach by local enforcement agents echoes the Government's promise of 'putting victims first' (Home Office, 2012), recourse to this approach should not be viewed as a panacea in addressing ASB.[22] As Duggan and Heap (2014) maintain, victims and their needs can be used as a Trojan horse for the adoption of a more punitive response to ASB. According to Sanders and Jones (2007: 282-283), in the context of criminal trials 'all too often the rights of the accused are portrayed as obstacles in the way of fair treatment for victims'. For this reason, according to them, we must be mindful of the 'trade-off[s]' between the rights of the accused and the needs of

[22] See 4.2.1.

the victim (Sanders and Jones, 2007: 282-283). Our main objective should be to strike a fair balance between the two.

In the context of ASB, this shift towards a victim-oriented approach can be used as a means to expand the net of social control to behaviour that falls within the remit of everyday interaction, such as 'kids playing football in the street' (Int.2 (LP) Site A). As Crawford, Lewis and Traynor (2016: 7) contend, adopting a more inclusive approach in terms of the way ASB is to be defined can result in a 'regulatory overload [and to] net widening'.

The concerns expressed by Duggan and Heap are further justified by the significant variations in communities' tolerance levels reported particularly in Site B. Evidence collected from this site suggests that people in more affluent areas and/or areas with lower crime rates tend to be less tolerant towards ASB. In contrast, in areas with high crime rates people tend to report only the most serious incidents of ASB 'because they have to deal with [criminality] on a daily basis…it becomes part of their normal lives' (Int.14 (PO) Site B). The following statement is illustrative of a number of responses given by many research participants in Site B through which these variations were highlighted: 'you will find this in the more affluent areas. The lowest level of anti-social behaviour will be reported there' (Int.13 (PO) Site B). It follows that the way different social groups perceive and approach ASB can vary considerably since this is influenced by their socio-economic background. This can also explain the reason why local enforcement agents in Site B are less inclined to adopt a victim-oriented approach in terms of the way ASB is to be conceptualised. It would be wrong to assume, however, that the adoption of a more victim-oriented approach in this context would inevitably lead to the expansion of the net of social control. As will be discussed below, the ambit of the law in this area is shaped by a number of factors most of which tend to narrow it down rather than to expand it.

*(ii) Review procedure*

It was evident from the data collected that the behaviour under scrutiny needed to be more than merely offensive or to cause something more than mere discomfort in order for it to fall within local enforcement agents' mandate. As one of the participants noted, each complaint/incident 'has to be taken by a degree of common sense because again lots of different people find lots of different things offensive' (Int.9 (LP) Site B).

In chapter 2, it was noted that a distinction must be drawn between behaviour which is merely offensive and behaviour which is more than merely offensive.[23] The former refers to behaviour that causes mere offence, and if the state was to regulate this behaviour it would have done so solely on the basis that it caused offence. The latter refers to behaviour which is worth regulating because it is not only offensive, but because it also undermines one of society's core values, e.g. it causes or threatens to cause harm to others.

As the next testimony from Site A illustrates, the same distinction was adopted by local practitioners and the police as well since they tended to focus only on the latter category of offensive behaviour:

> People have their eccentricities. I do not have any problem with those eccentricities … but if your habit is having an impact on the community and it is affecting people's lives then something needs to be done about it (Int.24 (LP) Site A).

As this local practitioner then explained: 'although [the ASB provisions] have been described as being draconian, in my mind they are only asking people to behave in a reasonable manner' (Int.24 (LP) Site A).

The testimony of this local practitioner is representative of the overall impression given by participants in Site A. Evidence suggests that there was a review procedure in place through which local enforcement agencies tried to strike a fair balance between victims' needs and expectations and behaviour which was really worth addressing.

As far as Site B is concerned, most of the participants also highlighted the need for their 'response to be measured' (Int.11 (PO) Site B) and to focus on behaviour that does not fall within the realm of everyday social interaction. For instance, as a local practitioner argued:

> If it is simply that someone is having children and their children are using their own back garden and they are causing nuisance to their neighbours because they do not want to hear children, then that is not anti-social behaviour and we will not deal with that. That is living sound (Int.16 (LP) Site B).

[23] See 2.2.5.

Overall, there was little to no evidence to suggest that these measures were used by either Site A or B in an irrational manner against behaviour which was merely offensive, caused mere discomfort or behaviour that was part of daily social interaction.

This finding is further strengthened by the fact that in most of the participating institutions the initial decision to classify someone's behaviour as anti-social 'goes through several layers of review' (Int.28 (PO) Site A). As a police officer put it, 'it is not just one officer on their own' who decides whether the behaviour at stake should fall within the ambit of the ASB legislation (Int.12 (PO) Site B). Rather, as the following testimony elucidates, cases were constantly reviewed both internally and externally:

> We have discussions on a weekly basis about the behaviour that has been reported and we have a team discussion about whether we would class that as anti-social behaviour and secondly whether it is something that falls within the rim of our team. Then we go to wider city meetings, the multi-agency assessment and targeting meetings. So we kind of get wider city consent as to what anti-social behaviour is (Int.5 (LP) Site A).

Although an internal review procedure was not available in three housing associations, it was noted by the research participants from these institutions that they tend to collaborate closely with their local CSPs. One of them also mentioned that their institution participates sometimes in 'wider city meetings' as well.[24]

*(iii) Availability of resources*

It was clear from the data collected from both sites that the implementation of the ASB legal framework relied heavily on the amount of resources available at a local level. In nineteen interviews the lack of resources and/or the costs of implementation of these measures were highlighted as one of the main factors that local enforcement agents would take into consideration when determining whether a particular incident should be regarded as anti-social. For instance, one local practitioner from Site A noted that:

> Because the resources are becoming a little bit more stretched we try to prioritise the cases where there is a personal harm of anti-social behaviour. We try to move away from the neighbour disputes and that sort of things (Int.20 (LP) Site A).

[24] I will return to this collaboration between local partners in 5.2.3.2.

As the above account illustrates, the limited availability of resources has led local enforcement agents to concentrate on the most serious incidents reported to them. This is behaviour that is situated in the upper end of the ASB spectrum. As one police officer pointed out, 'there has to be a realistic understanding…we have reductions in the number of police officers. We have to focus on risk and harm' (Int. 11 (PO) Site B). The foregoing testimonies accurately reflect a number of responses provided by participants who emphasised that the limited resources available for tackling ASB and criminality forced them to focus on behaviour that had a significant and detrimental impact on people's quality of life rather than on everyday incivilities, such as minor neighbour disputes.

This can also explain to a certain extent the overlap between ASB and criminality. As discussed in more detail below, evidence from this study also suggests that the amount of resources available was likely to have an impact on the procedure followed after someone's behaviour was labelled as anti-social.[25]

Taken as a whole, it was evident from the interviews conducted in both sites that behaviour is not arbitrarily labelled as anti-social. Instead, in both sites there was a review mechanism in place through which local enforcement agencies tried to ensure that they focused only on behaviour that really had an impact on people's lives.

### 5.2.2 Second Pillar: The 2014 amendments

Before elaborating on the procedure followed after a potential incident of ASB was reported to the relevant authorities, research participants were asked to comment on the 2014 amendments and whether these had any impact on the daily administration of ASB at a local level. Particular emphasis was paid to the following three issues: (i) the widening of ASB's statutory definition; (ii) the repeal and replacement of the ASBO; and (iii) the introduction of positive obligations. Since the first issue has already been discussed above, I will now turn my attention to the remaining two issues.

#### 5.2.2.1 The move to a purely civil response

Although the ASBO's hybrid nature was one of its most contentious and heavily criticised features academically,[26] its abandonment attracted mixed responses from the research participants. For the majority of the participants the move to a purely civil injunction was unlikely to have any significant effect on the daily administration of ASB. According to

[25] See 5.2.3.
[26] See 'The pre-2014 approach to anti-social behaviour'.

the data collected during this study, there are three possible explanations for this. First, the majority of interviewees noted that the ASBO was just one out of the many tools and powers in their arsenal in dealing with ASB and criminality. As one of the interviewees noted: 'we have got offences with which we can still deal with people for and I am not overly concerned that the breach is not an offence anymore as long as we can still deal with it effectively' (Int.13 (PO) Site B). This is in line with the above findings and with the findings of previous studies which highlighted the overlap between ASB and criminality (Koffman, 2006; Lewis, Crawford & Traynor, 2016).

Secondly, reference was made in both areas to the way courts used to deal with those who were found in breach of their ASBOs. Two participants from Site B argued that the shift to a purely civil mechanism was unlikely to have any impact on the way they were dealing with ASB since the ASBO 'was anyway a toothless tiger' (Int.14 (PO) Site B). According to one police officer, 'under the old legislation we would go back [to court] after breaches time after time and nothing would happen to that person. So, I do not think that it particularly concerns me' (Int.14 (PO) Site B). In contrast to this, two interviewees from Site A noted that they were 'quite confident' (Int.4 (LP) Site A) that 'if you are having lots of breaches the next time they go back to court it will obviously be taken a lot more seriously' (Int.7 (LP) Site A). A possible explanation for these contradictory statements was, according to one police officer, that judges tend to treat perpetrators differently:

> She breached it again within 4 days. So she went back to court and unfortunately we sat before a different judge and he actually deferred that case until January. But if she was to come back again in front of him she would definitely get a custodial (Int.18 (PO) Site A).

Thirdly, for some interviewees this shift towards a purely civil injunction was unlikely to have any real effect on certain individuals. According to them, the main reason for this was that some perpetrators would simply not comply with a court order or an injunction regardless of the possible consequences. One interviewee noted that 'you are still going to get the twenty per cent who did not care. They did not care because they had other issues' (Int.8 (LP) Site A).

Ten interviewees expressed their concerns as to whether a purely civil response will be as effective as the ASBO used to be in dealing with ASB. Many of the participants

focused on the effectiveness of the ASBO as a 'bargaining tool for working with a person and getting them to understand the consequences of their behaviour' (Int.4 (LP) Site A). It had been suggested that the criminal nature of the ASBO's second limb acted as a leverage for the perpetrators to change their behaviour. Consequently, this shift to a purely civil method of regulation means that those who act in an anti-social manner are no longer provided with 'prudential reasons for desistence' (von Hirsch, 1993: 12). More than a third of the interviewees argued that the abolition of the hybrid model will have a detrimental impact on the injunction's overall deterrent effect. As one police officer explained 'it is a real shame…I think it has taken some of the bite away from the legislation' (Int.12 (PO) Site B).

Another cause for concern for many participants was the fact that a power of arrest is not automatically attached to an injunction. Whilst breach of the ASBO constituted an offence and thus the police were able to immediately arrest anyone found in breach of his order, this is not the case with the new injunction. Under section 4(1) of the 2014 Act, the institution applying for the issue of an injunction must demonstrate either that the respondent has a history of violence or that that he poses 'a significant risk to others' in order for a power of arrest to be attached. According to some participants, obtaining a power of arrest is not as easy as it might appear to be:

> There is no point in even bothering looking at an injunction for him because he does not even care…In reality it will be unlikely to get a power of arrest attached to the injunction for him despite him having more aggravated offences on his record than anybody else in our city. The standard criminal justice has acted and it seems that it had no deterrent effect on him behaving in that way and an injunction without a power of arrest attached it would not have any effect. He is someone who actually if anything is to work is the imminence of arrest and significant sanction. An injunction would not do that (Int.1 (LP) Site A).

The abovementioned concerns in conjunction with the limited amount of resources available led many of the participants to express their reservations as to whether they should be applying for the issue of an injunction. According to one of the interviewees 'it makes me think what the point is. One of the things is that it costs a lot of money and if it is not a criminal offence, then for what purpose?' (Int.3 (LP) Site A). This finding was further supported by a number of other testimonies based on which local enforcement agents are now more focused on getting a CBO rather than an injunction. As one interviewee pointed out, 'I think that there is more pressure to get a criminal order because

(a) you have the power of arrest more or less kind of automatic and (b) in theory the court will cost less' (Int.15 (PO) Site A). This should be linked with our earlier discussion about the impact that the limited availability of resources had on the way ASB was conceptualised by local enforcement agents.[27]

This focus on the post-conviction order is not a new phenomenon. Between 2002 and 2013 the number of CrASBOs issued was almost twice the number of ASBOs (Ministry of Justice, 2014b). The above finding, however, raises fundamental questions about the administration of justice which appears to be driven to a large extent by the amount of resources available at a local level rather than by principles of justice.

Most importantly, it undermines the preventive nature of the civil injunction. The introduction of the civil preventive measures was premised on the assumption that the state should be able to address ASB at an early stage in order to prevent it from escalating to serious criminality (Crawford, 2009). The focus on the CBO, however, means that local enforcement agents will have to wait for someone to be found guilty of an offence in order to address their ASB. This is in line with the findings of Lewis, Crawford and Traynor (2016: 3) who found that the implementation of the ASB tools and powers 'refute[s] the logical sequencing of prevention' because some of those against whom these measures were used had 'already engaged in serious or persistent offending'.

5.2.2.2 The introduction of positive obligations

The introduction of positive obligations under the 2014 Act was regarded by the Government as a necessary addition to the new tools and powers since 'in many cases, there are underlying causes of the anti-social behaviour' (Home Office, 2014: 19). The perpetrator does not simply choose to act in an anti-social manner. Instead, in many cases the perpetrator's behaviour has deeper causes which cannot be addressed through the imposition of bland prohibitions. Through the introduction of positive obligations local enforcement agents are invited to engage with these underlying causes and provide perpetrators with the necessary support needed in order to address these causes (Home Office, 2014). In the case of an alcoholic, for example, these positive obligations can be utilised in order for the perpetrator to attend an alcohol-related treatment.

[27] See 5.2.1.4.

There was strong evidence to suggest from this study that the majority of the interviewees perceived this addition as a positive development, since it enables them to work with the perpetrators to address the underlying causes of their behaviour. As one of the interviewees pointed out 'in a lot of cases you can only address anti-social behaviour if you address the underlying causes…and sometimes I think people need to be pushed or even ordered to seek help with some things' (Int.2 (LP) Site A). In addition to this, it was noted by some interviewees that positive obligations can also be used to repair the harm caused to victims by, for instance, 'mak[ing] someone clean up street graffiti' (Int.26 (LP) Site A). According to some of the participants, positive obligations were already used through the ABCs. A police officer explained that the ABCs were not just used to put restrictions on the perpetrator's behaviour, but they were used as a means of referring people to 'juvenile services or attend this club six times a week' (Int.29 (PO) Site A). The foregoing testimony is consistent with the findings of Crawford, Lewis and Traynor (2016: 3) who found that positive obligations were already imposed 'by way of support services to be accessed by the individual'. Nevertheless, it was evident from the testimonies provided that for the majority of the participants the introduction of positive obligations is a step in the right direction.

Although compulsory attendance to an alcohol-related treatment can be perceived as an interference with that person's liberty and autonomy (Gert & Culver, 1976), this can be justified on the ground that this can potentially enhance the 'welfare…of the person being coerced' (Husak, 2012: 468). It can also be justified on the ground that these paternalistic interventions are capable of providing permanent rather than temporary relief to those affected by the perpetrator's behaviour. As discussed earlier,[28] however, paternalistic interventions through criminalisation can be very contentious if 'limited state intervention of a civil character is justified' (Simester & von Hirsch, 2011: 148). Consequently, it is imperative to examine whether these measures are operating as *ad hoc* criminal rules.

### 5.2.3 Third Pillar: Procedure followed

The third section of the interviews focused on the procedure followed by local enforcement agents after someone's behaviour was labelled as anti-social until the point of applying to court for the issue of an injunction. It was not my intention to examine in

[28] See 2.2.4.

depth any specific informal interventions used in the sites under study. Rather, the main objective of this section was to: (i) gain an insight on how incidents of ASB were managed in these sites; (ii) examine whether resorting to enforcement was a 'last resort' measure; and (iii) the basis for resorting to enforcement.

5.2.3.1 Actuarial justice

It was clear through this study that the administration of ASB was primarily risk driven. When local enforcement agencies were notified about an incident of ASB a risk assessment was carried out in order to assess the level of risk faced by the victim. Central to this risk assessment was the impact that someone's behaviour had on others. This of course is in line with the Government's promise for a more victim-oriented approach with regards to ASB (Home Office, 2012). It is also consistent with the more general shift in governmental policies towards preventive-led interventions discussed earlier.[29] As Zedner (2009: 35) explains, these interventions aim 'to calculate, anticipate and forestall harms before they occur'.

The next testimonies are illustrative of the procedure followed in both areas when a potential incident of ASB was reported to them and the importance attributed to the level of risk faced by victims. One interviewee from Site A noted that 'initially if a person phones up and says that they are suffering from this or the other, even from the telephone stage there is a risk assessment done by the call-taker' (Int.21 (PO) Site A). As another police officer from Site B explained, this risk assessment comprised of 'a series of questions which would be asked to the victims of anti-social behaviour to identify what risk level they are at: being standard, medium or high' (Int.12 (PO) Site B). The risk-assessment carried out in both areas is in line with the Statutory Guidance issued by the Home Office. Based on these guidelines, it is considered as good practice for local enforcement agents to premise their investigation on the impact that the behaviour reported 'is having on the victim, particularly if repeated incidents of anti-social behaviour are having a cumulative effect on their well-being' (Home Office, 2014: 19).

What was clear from the evidence collected in both areas was that the level of risk faced by the victim informed the entire procedure followed by local enforcement agents and not just the initial stage of their investigation. According to one police officer, the level of risk faced by the victim 'will [be] monitored until we have reduced that risk right

[29] See 'Introduction'.

down to a level where we can say actually "we have solved this problem. The person is no longer at risk"' (Int.18 (PO) Site A).

5.2.3.2 Multi-agency approach

As far as the high-risk cases are concerned, no significant variations were reported between the two areas with regard to the procedure followed. Evidence collected from both areas suggests that high-risk cases were regarded as a top priority and were discussed at the local CSP's multi-agency meetings which were held on a regular basis. As one police officer noted 'once a week we will meet with the local authority and we will basically discuss all of our high-risk cases and just check that we are doing everything that we can in a timely manner and that we have not missed anything' (Int.12 (PO) Site B).

It was evident from this study that the ultimate objective of local enforcement agents was to gather as much information as possible about the alleged perpetrator. This was not only achieved by conducting their own investigation, but also through their collaboration with other agencies and their information-sharing agreements. The next testimony is illustrative of the multi-agency approach adopted in both areas:

> We must make sure that other agencies are aware of that person…so it is really the case that a lot more agencies are involved now. Obviously in the past it was unstructured. The police would do their thing, the council would do their thing and it was not always connected to each other…with this new computer system we can put entries into the system which the council can read instantly (Int.15 (PO) Site A).

To emphasise the importance of these information-sharing agreements, one of the interviewees made reference to the tragic case of Fiona Pilkington: 'we all knew a little bit about it and this is where the sharing of information comes in. Each individual person had bits and pieces but it was never joined up and brought together and hence the reason why this database was brought in' (Int.18 (PO) Site A).

What was also important about this multi-agency approach was that high-risk cases were examined from various perspectives and a collective decision was taken as to the best way forward. Most of the participants made explicit reference to their collaboration with other local partners and its potential benefits. The following narrative

explains how the police's attitude towards members of the 'street community'[30] changed due to their collaboration with other local practitioners who had a social care background and more experience in dealing with this group of people:

> The police had a very negative attitude to them because they saw them as a bit of a pain where they were breaking up fights. So it was always a crisis intervention. So one of the cultural changes for the police back in those days was – we had to work together for two weeks solid and they had a no arrest policy and we got them to take off their hats, they still had uniform, to start breaking down those barriers which we found very difficult (Int.3 (LP) Site A).

Although under section 6 of the 1998 Act a duty is imposed on local authorities, the police and other public service providers to cooperate and formulate strategies through which they should address crime and disorder in their 'local government area', it was clear from the data collected from both sites that there was an effective 'responsibilisation strategy' in place (Garland, 2001: 124). As Garland (2001: 124) explains, the 'responsibilisation strategy' refers to the process of connecting 'state agencies…with practices of actors in the "private sector" and "the community"' in order to delegate the responsibility of crime management and prevention to other relevant stakeholders. According to one interviewee, 'if they are social housing tenants or private sector tenants we will get in touch with their landlord…because obviously landlords also have an obligation to deal with anti-social behaviour' (Int.9 (LP) Site B).

As the following testimony demonstrates, this shift of responsibility can be partly attributed to the limited resources available to state agencies, such as the police, to deal with crime and ASB: 'there are not enough police officers as they used to be to deal with this and in theory you have partners who are trying to deal with it as well' (Int.8 (LP) Site B). Another possible explanation can be that 'good governance came to be identified with dependency on expertise, as the locus of objective knowledge required for scientific and professional management of the social' (O'Malley & Palmer, 1996: 140). On this view, the management of crime and ASB should be left to those who hold the necessary skills and experience needed. As one police officer explained, 'we will always look at a sort of multi-agency approach. If there are other agencies that can be involved in order to get

[30] Street community includes primarily street drinkers, rough sleepers and beggars.

them the kind of support they need in order to prevent them from committing further offences' (Int.27 (PO) Site A).

There was an impression that the procedure followed by local enforcement agents was well structured and complied with the statutory guidance issued by the Home Office (2014). This is not to suggest that local enforcement agencies simply tried to follow the Home Office's guidelines. Rather, there was an impression from both sites that the majority of the participants strongly believed that a multi-agency approach was the best way forward both in terms of information-sharing and the administration of high-risk cases. This well-established multi-agency approach in both sites contradicts the findings of previous studies according to which there was 'a lack of joined-up approaches within and between partners'(Crawford, Lewis & Traynor, 2016: 7) and 'inconsistent attitudes towards information sharing' (Donoghue, 2010: 99-100). As discussed earlier, some possible explanations for this include the lack of resources and the realisation by local enforcement agents that on many occasions ASB is the precursor of a number of other issues that need to be addressed if a permanent solution is to be achieved.

5.2.3.3 Informal interventions

As evidence from previous studies suggests, applying to court for the issue of an ASBO was not, in general, a first resort measure for local enforcement agents (Koffman, 2006). Instead, according to Lewis, Crawford, and Traynor (2016: 9-10), the measures used at a local level to address ASB 'form[ed] a pyramidal system of regulation' with the ASBO being located at the top end. Based on this 'pyramidal system', those whose behaviour was deemed as anti-social would initially receive a warning letter urging them to alter their behaviour (Lewis, Crawford, & Traynor, 2016: 9-10). Failure to comply with this warning letter would result in the issue of an ABC (Lewis, Crawford, & Traynor, 2016: 9-10). The final stage would include an application for the issue of an ASBO (Lewis, Crawford, & Traynor, 2016: 9-10). Based on their findings, although the existence of this 'pyramidal system' was confirmed, in practice they found that there were 'myriad variations' amongst the sites under investigation with some of them adding extra layers of regulation (Lewis, Crawford, & Traynor, 2016: 9-10).

Evidence collected by this study confirms the existence of this 'pyramidal system of regulation' in both sites with the injunction located at its top end. Nevertheless, it was evident that there has been some departure from out-of-court interventions which purely

aim to achieve compliance through the threat of sanctions. In particular, there was strong evidence to suggest that in both sites there was a shift towards a more restorative justice (RJ) approach.

Before elaborating further on the informal interventions used in both sites, it is instructive to engage with the principles underpinning RJ and some of its processes which will be referred to in this study, such as victim-offender mediation. Central to any RJ process is the need for the relevant stakeholders to come together in order to discuss the behaviour in question and reach to a commonly agreed solution (Ashworth, 2004). As Johnstone and van Ness (2006: 5) explain, what really distinguishes RJ from other forms of social control is that it departs from the state-centred administration of justice towards a more 'community-based reparative justice' model. Consequently, what makes RJ processes appealing is their 'commitment to combating oppressive state structures of inhumane reliance on prisons' (Braithwaite, 2002: 564). Thus, as far as criminal wrongs are concerned, RJ offers an alternative to criminal prosecution through which the wrong committed by the offender can be addressed without the need to resort to the most coercive means of social control.

Although RJ processes share many characteristics, they can vary considerably both in terms of their structure and possible outcome. As to the former, some of these processes target the community at large rather than individual victims (Dignan, 2007). An example of this would be community conferences (or citizen panels) which primarily aim to address 'victimless' crimes which have a detrimental impact on the community's quality of life (Kurki, 2003: 304-305). Another key objective of these conferences is to 'strengthen community solidarity' (Kurki, 2003: 311). In contrast to community conferences, central to the victim-offender mediation is the participation of the victim who is given an active role in the management of their case (Kurki, 2003). As Walters (2014b: 37) explains, this type of mediation usually involves 'a single mediator who acts as an impartial facilitator of direct dialogue between the parties' involved. Vital to this process is the need for the wrongdoer to assume 'responsibility for their actions and to repair the harms they have caused directly to the victim' (Walters, 2014b: 37).

As to the latter, the outcome of every RJ practice can vary depending on the merits of each case (Walters, 2014b). For instance, in cases where no physical harm or any damage to the victim's property was caused, it might be decided that the perpetrator needs

to offer an apology. Similarly, if damage was caused to the victim's property, it might be agreed that the perpetrator should repair the damage themselves or compensate the victim for it (Walters, 2014b).

Although some of the interviewees made reference to community conferences, most of them noted that the most commonly used process was victim-offender mediation. This is not to suggest that warning letters or ABCs were not used in these sites. Rather, it is to argue that it was clear through this study that RJ practices were amongst the most commonly used informal interventions in these sites. The following testimony provided by a local practitioner in Site A is illustrative of this shift both in terms of their approach towards the victim and the alleged perpetrator:

> We support people, additionally called victims, but we are trying to move away from that to a more restorative type of language and approach …We try to consider what restorative options might be. So, somebody has come to our attention for the first time and they are willing to engage we will try and look at restorative options. We will they be willing to write a letter of apology? We will they be willing to meet and have like a community conference with different parties there? (Int.4 (LP) Site A).

A similar shift was also observed in Site B. As one of the interviewees pointed out 'we are using more of the restorative justice side of things…a lot of us have received RJ training and we are trying to get the local communities to solve the problem. It is about trying to talk with your neighbours' (Int.8 (LP) Site B). It is also worth noting that explicit reference was made by most of the participants from Site B to the use of victim-offender mediation as one of the most commonly RJ practices used. As one ASB officer from a Housing Association pointed out they have 'a contract with a mediator' and they tend to use his/her services especially when the behaviour at stake involves 'counter allegations' between neighbours (Int.16 (LP) Site B).

The importance of this shift towards a more RJ approach should not be underestimated. The use of victim-offender or community mediation in the context of hate crimes has been very successful in 'reducing [victims'] emotional harm and preventing further hate incidents from recurring' (Walters, 2014b: 239). This was also confirmed by one local practitioner who argued that their 'best success rate is around mediation' (Int.9 (LP) Site B).

Moreover, RJ provides victims of ASB with an opportunity to be heard, 'to play a part in repairing the harm and finding a positive way forward' without resorting to any formal legal action (Ministry of Justice, 2014a: 3). This enhanced role given to victims was not limited to their participation in mediation or any other form of RJ used. Especially in Site A, there was strong evidence to suggest that victims and their needs had a pivotal role in the management of their case. The following testimony illustrates the victim's role in this process: 'we will not do anything without their permission. If they give us permission to address or talk to the person that they believe is causing the harm we will approach them as a team' (Int.4 (LP) Site A). The importance attributed to victims of ASB in this area was further evidenced by the fact that they were 'kept informed about what was happening with their case' (Int.2 (LP) Site A). As one of the interviewees pointed out, the fact that they were kept informed about the management of their case 'helped them [to] feel safer' (Int.1 (LP) Site A).

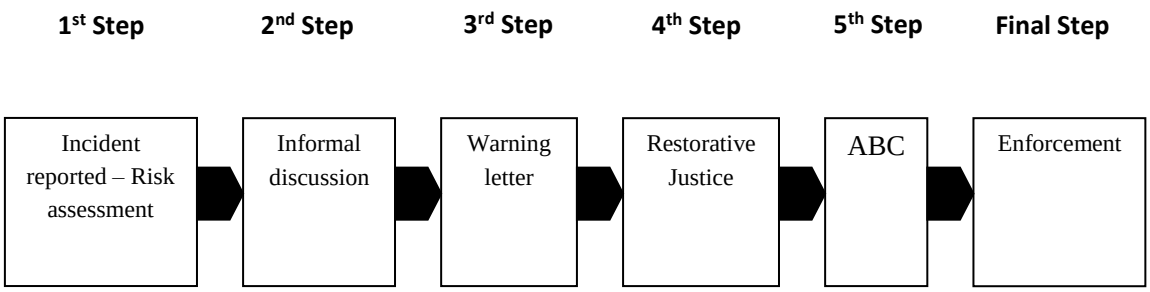
### 5.2.4 Fourth Pillar: Resorting to enforcement

It was clear from the evidence collected by this study that in most of the cases 'a warning letter or a conversation with an individual or the alleged perpetrator will stop the behaviour' at stake (Int.9 (LP) Site B). In both sites, there was a genuine belief that applying to court for the issue of an injunction or a CBO should be generally reserved as a last resort measure. According to one police officer, 'there are reasons for this behaviour so we need to look into it. I need to work with these people' (Int.18 (PO) Site A). Their initial objective, therefore, was to identify the underlying causes of ASB and 'try to look at a support network' (Int.11 (PO) Site B) for that individual. As one local practitioner explained, 'taking it to court, for me personally is failure on what we can do otherwise to remove the anti-social behaviour' (Int.10 (LP) Site B). The following testimony is representative of the approach adopted in both sites:

> When we go to court for an injunction I want to be sure of two things. We can present the evidence that the person has behaved anti-socially, but also that we can show that everything else we have done and tried to address it because that is in a way what gives you the argument to argue for necessity or that is why it is reasonable to issue the order (Int.2 (LP) Site A).

Figure 5.1 is illustrative of the procedure followed by local enforcement agents in both sites with regard to the management of ASB incidents.

**Figure 5.1: The standard process of regulation followed in sites under study**




Although Figure 5.1 is illustrative of the standard procedure followed when someone's behaviour was labelled as anti-social, evidence from both sites suggests that when the level of risk posed by that person was high, then the perpetrator would move through the above steps very quickly. One interviewee noted that 'if their behaviour is quite serious we will move to enforcement quickly. If there is physical violence or if there is a hate element it will be much more likely to go to court and speed it up. So we do look at the severity and the harm that is caused' (Int.5 (LP) Site A). This replicates the findings of previous studies based on which the use of formal legal action against those who behaved in an anti-social manner was neither a first nor a last resort measure (Crawford, Lewis, & Traynor, 2016; Koffman, 2006). Instead, this was done 'on a case by case basis…depending on the specific facts of the incidents reported' (Int.3 (LP) Site B).

Taken together, the above accounts suggest that applying to court for an injunction or a CBO was generally reserved in both sites as a 'last resort' measure unless the level of risk posed by the perpetrator was high. As far as the injunction is concerned, if the behaviour in question was regarded as a high-risk incident, then local enforcement agents would not follow each step of the process outlined in Figure 5.1. As one local practitioner noted, 'if it is a high-risk case then we will create a separate action plan' (Int.16 (LP) Site B). Similarly, the overall impression from both sites was that if the perpetrator committed an offence and there was already a long history of persistent ASB and criminality, then they will apply for the issue of a CBO.

5.2.4.1 Overlap between anti-social behaviour and criminality

As noted earlier, research participants were asked to define and provide examples of behaviour that they would classify as anti-social. For the majority, ASB can range from behaviour which at the face of it appears to be harmless and part of every social interaction

(the lower end of the scale) to behaviour that is already proscribed by criminal law (the upper end of the scale).[31] Some common examples cited by the majority of the participants included common assault and criminal damage. This study collected evidence on how participants and their institutions dealt with this kind of behaviour. In particular, police officers were asked whether an incident situated in the upper end of the scale would be dealt with as a criminal offence, as ASB, or a combination of the two (i.e. to apply for a CBO). Similarly, local practitioners were asked whether they would address this kind of behaviour themselves or if this was a matter for the police to deal with.

In Site A, the majority of the police officers noted that 'the criminal aspect will always take precedence' (Int.15 (PO) Site A). Simply put, if a criminal offence was committed, then the criminal justice route would be followed. As one police officer argued, this was the 'rule of thumb…when a criminal act' was committed (Int.15 (PO) Site A). This was reaffirmed by most of the local practitioners from Site A who argued that if an offence was committed, then the police would deal with it as a crime. One local practitioner noted, for instance, the following: 'I have met beggars making £500 per week easy…Sometimes it is money by deception. When I used to do targeted work with the police is that nine out of ten times the police will deal with them as a beggar' (Int.2 (LP) Site A).

Six out of the nine police officers who participated in this study from Site A noted that if they are dealing with a prolific offender, then they will 'apply for a CBO in looking at ways of actually preventing that from happening' (Int.23 (PO) Site A). According to the majority of the police officers from Site A, the main reason for this is the inability of the criminal law to deal effectively with prolific low-level offenders. The following testimony is illustrative of the general dissatisfaction of police officers with the criminal law:

> They can be dealt with as crimes. However, as I said earlier, individuals who have been dealt with numerous times for harassment, public order offences and continue to offend, they continue to go before the court. Sometimes an injunction with a stronger power needs to be put in place to try and prevent that person…The CBO and the civil injunction hold a higher penalty and if it means that we have to deal with them with the higher

[31] See 5.2.1.

> penalty than the penalty for the criminal offence then so be it (Int.18 (PO) Site A).

In contrast to the foregoing testimony and what the majority of their colleagues argued, two police officers noted that they would use the ASB tools and powers as an 'addition to their criminal investigation. As a holistic approach to actually solving the problem' (Int.21 (PO) Site A). As most of the local practitioners from Site A pointed out, the criminal law alone cannot adequately address the underlying causes of criminality. One of the local practitioners, for instance, noted that 'going to prison it is such a short stain. It is not long enough in order to have the results that you need. To change someone's behaviour it takes time. It takes work. It does not happen overnight' (Int.7 (LP) Site A). Consequently, the use of a CBO is sometimes necessary in order to 'bring that long-term change' (Int.5 (LP) Site A) through the imposition of certain positive obligations.

Finally, one police officer noted that in the case of non-prolific offenders the injunction will be used as a means of diverting them away from criminality. Based on this testimony 'if it is one off low-level then no we are no way near that…If there is a fifteen-year-old who does graffiti for a first time are we going to criminalise this person? Or is it better to make him face the victim and scrape this off the wall themselves?' (Int.26 (PO) Site A).

As far as Site B is concerned, mixed responses were received as well. For many of the participants behaviour that constitutes an offence should and is dealt with by the police as a crime. As one police officer explained, if the behaviour at stake 'does not quite meet the criminal standard', then:

> We will always try to see the civil application because they are quicker and therefore you get more effective turnaround for your victims. Whereas if you go on the back of a criminal conviction, then some cases might take a year if not more to actually be heard at court. And if you are waiting for that you still have that person playing up. It is not going to do anyone any favours (Int.12 (PO) Site B).

The officer then continued to explain that 'if there is a criminal offence that will be dealt with there and then. The anti-social behaviour element and its tools and powers are coming in as a secondary, almost a support, measure to ensure that everything else is looked at as well' (Int.12 (PO) Site B). On this view, if a criminal offence was committed, then they would try to secure a conviction and if necessary obtain a CBO.

For another group of participants (three out of nine) the use of the criminal law should be reserved as a last resort measure. One police officer noted that 'if we can deal with somebody without criminalising them, then this is ideally what we want to do' (Int.13 (PO) Site B). As one interviewee explained, their main objective was to 'divert [people away from criminality] rather than implementing the full power straight away' (Int.10 (LP) Site B).

The use of the CBO as a means of compensating for the inability of the criminal law to deal effectively with persistent low-level criminality raises a number of fundamental issues. One of the most important issues raised here is whether we can modify the criminal law in such a way as to make it effective against persistent low-level criminality without the need to resort to 'multiple sanctions and strategies of behaviour regulation' (Lewis, Crawford, & Traynor, 2016: 11). As far as the use of the injunction as an alternative to the criminal law is concerned, concerns can be raised as to the legitimacy of this approach and the fact that it constitutes a form of *under-criminalisation*.[32]

5.2.4.2 Applying for the issue of an injunction or a criminal behaviour order

The impetus for initiating this research project partly came from the possible restrictions that can be imposed on someone's liberty during the initial phase of the two-stage regulation process rather than the sanction received if found in breach of the injunction. As Duff and Marshall (2006) contend, although breach of the ASBO (the second stage) constituted an offence, we should also be mindful of the restrictions/obligations imposed on those against whom an ASBO was issued (the first stage) because they had the potential to constitute a form of criminal punishment in their own right.[33] In order to test the validity of this contention, it is necessary to examine more closely the restrictions/obligations imposed on those against whom the ASB tools and powers are used. The findings of this analysis can then be examined with reference to the working definition of criminalisation formulated in chapter 3, in order to investigate whether they indeed amount to criminal punishment.

[32] See 6.2.2.

[33] This argument is still valid for those ASBOs still in force. As explained before, there is a five-year transitional period for the ASBOs issued prior to the 2014 Act.

*(i) Imposing negative obligations*

As expected and in line with the findings of a previous study, according to many participants, the most common types of restrictions imposed on those against whom these measures were used included: '(i) people being prohibited from doing certain things; (ii) going to certain places; (iii) be with certain people; and (iv) being out and about in certain times, i.e. curfews. I think geographical exclusion is the most common' (Int.2 (LP) Site A) (see also Matthews et al, 2007). One police officer, for instance, made reference to the case of a street drinker who was prohibited from entering into a 'particular road...and not to have an open can in a public space' (Int.15 (PO) Site A).

As acknowledged by one interviewee, congregating with certain individuals, entering into specific parts of town or feeding pigeons 'appear to the surface to be everyday lawful activities' (Int.4 (LP) Site A). Prohibiting someone from engaging in those otherwise lawful activities appears to be very contentions for two main reasons. First, certain activities, such associating with others, fall within the ambit of liberty as this was conceptualised in chapter 3.[34] Based on this formulation of liberty, rights and freedoms which are protected under the ECHR and brought into domestic law by HRA 1998 should be regarded as basic and/or fundamental for this society. Accordingly, interference with these rights and freedoms will satisfy the first prerequisite of the working definition of criminalisation.

Secondly, the imposition of the abovementioned restrictions can be criticised for creating personalised prohibitions which only apply to certain individuals rather to the entire society (Gil-Robles, 2005). In theory, the creation of these personalised prohibitions allow local enforcement agents to criminalise indirectly specific groups of people whilst circumventing the enhanced procedural protections afforded to those facing the prospect of direct criminal punishment.

*(ii) Imposing positive obligations*

Most of the participants made particular reference to the imposition of positive obligations and their potential benefits. Some of the most commonly cited examples included: (i) attending drug or alcohol related treatments; and (ii) engaging with the 'mental health services' (Int.8 (LP) Site B). As one police officer noted, positive obligations 'are very handy' since they can be used to address the underlying causes of

[34] See 3.2.1.

the behaviour at stake (Int.15 (PO) Site A). The importance of this, according to many of the participants, lies with the fact that if 'someone is addicted to drugs and you just tell them to stop, then they will not stop' behaving in an anti-social manner (Int.16 (LP) Site B). For this reason, local enforcement agents tried to impose certain positive obligations that they deemed appropriate to address the underlying causes of the problem:

> If you have got somebody who has mental health issues, then you have to tackle the mental health issues rather than on putting restrictions on their activities. You have to make sure that they engage with the mental health services, the psychiatric nurses, the doctors and anything else (Int.8 (LP) Site B).

Moreover, the foregoing account highlights once again the presence of a 'responsibilisation strategy' where local enforcement agents seek to 'enlist wider actors' in their ASB strategies (Crawford, 2009: 811).

Although the imposition of certain positive obligations aimed to address the underlying causes of ASB, it was a common belief amongst most of the participants that they had to convince the court examining their application that these obligations were both essential and that they had 'the necessary infrastructure in place to support' them (Int.17 (LP) Site B). As a local practitioner noted, if the necessary infrastructure and support mechanisms are not in place, then 'you will be setting the client up to fail' (Int.17 (LP) Site B).

Nonetheless, it was evident from the data collected that on many occasions the restrictions/obligations imposed interfered with the perpetrators' liberty. On many occasions, for example, those against whom an injunction was issued were prohibited from associating with certain individuals and/or accessing certain public spaces and roads. Both of these rights and freedoms are protected under the ECHR. For the purposes of this study, therefore, they should be regarded as basic and/or fundamental.[35]

The foregoing conclusion can be criticised for failing to take into consideration the purpose of the restrictions/obligations imposed on the perpetrators. It could be argued, for instance, that the imposition of certain restrictions on those who behaved in an anti-social manner should not be regarded as an interference with their liberty since their

[35] Article 5 and article 11 of the ECHR respectively. These rights and freedoms should be read in light of the way liberty has been conceptualised in this study (see 3.2.1).

ultimate objective was to prevent further ASB and criminality.[36] Although the purpose of these restrictions/obligations appears to be legitimate, we still need to be mindful of the impact of these measures on the perpetrators. Moreover, it should be remembered that in order for these restrictions to amount to criminal punishment, they also need to *publically* and *purposefully* convey censure. Otherwise, these restrictions will simply constitute non-punitive sanctions.

*(iii) Were the perpetrators publically and purposefully condemned?*

The implementation of the ASBO was heavily criticised due to the 'naming and shaming' practices used by many local enforcement agencies around England and Wales in previous years.[37] Despite the concerns raised, in *Stanley*, the publication of the ASBO recipients' personal details along with the restrictions imposed on them was deemed compatible with the provisions of Article 8 of the ECHR, the right to 'private and family life' (para. 31). More precisely, it was held that the publication of this kind of information was essential for the effective enforcement of the ASBOs (para. 40). A similar approach with regard to the publication of this kind of information is adopted under the 2014 Act with the Statutory Guidance emphasising the need to reassure victims and local 'communities that action is being taken' (Home Office, 2014: 24). Although the publication of certain information can be *necessary* under certain circumstances, it was evident in some cases, such as in *Stanley*, that this could also be used as a means to publically condemn the ASBO recipients. The pressing question, therefore, is whether the implementation of ASB measures purposefully resulted in the public condemnation of those against whom these measures were used.

In Site A, most of the participants stated that they would publicise information about the perpetrator and the obligations/restrictions imposed on them only to those 'affected' by their behaviour (Int.19 (PO) Site A). As one local practitioner explained, 'you have to be very proportionate as to how you ensure that people are aware of the order…if a person is banned from going to Co-op you do not need to inform the national press about it. You just let people who enforce it and the Co-op staff' (Int.26 (LP) Site A). This need for targeted publicity was further evident by a number of other testimonies according to which publicity should be limited only to what is absolutely *necessary* for

[36] I will elaborate further on local enforcement agents' intentions in 5.2.4.3.
[37] See 4.2.2.2.

the effective policing of the measures put in place. To illustrate this, one interviewee made reference to a case where 'local residents were given a photo pack. They all had to sign the Data Protection and they would have different photos of that person. Not giving their identities but showing them so people could report the behaviour that was going on' (Int.3 (LP) Site A).

Moreover, what was clear from the evidence collected is that for the majority of the participants it was important to ensure that 'each case [was] dealt with on its own merits' (Int.21 (PO) Site A). The following account given by one local practitioner is representative of most of the testimonies given in Site A:

> Every case needs to be risk-assessed…there will be a multi-agency risk assessment that will need to take place. What are the risks to the individual if the public finds out about what they have done? You look at age. You look at personal circumstances. You look at the impact upon the victim…It is not publicised in every occasion, but everything you do is revisited and reassessed in order to make sure that it is *proportionate* (Int.9 (LP) Site A) (emphasis added).

The need to take into account the potential impact that the publication of certain information might have on the perpetrator was emphasised by many participants, especially in cases involving young people. As one local practitioner mentioned, publicising information about a young individual can be counterproductive because it is likely to 'increase the fear of harm and the negative views about young people' (Int.2 (LP) Site A).

The foregoing testimonies are consistent with the Statutory Guidance according to which 'each case should be decided carefully on its own facts' striking a fair balance between the perpetrator's right to privacy and the effective enforcement of these measures (Home Office, 2014: 24-25). Moreover, they reiterate that the administration of ASB in this site was mainly risk-driven.

Although for most of the participants publicising information about the perpetrators and the behaviour should be confined only to those immediately affected by this kind of behaviour, many participants noted that under certain circumstances information should be shared more widely. They noted that this would only happen in cases where the 'victim is at real risk and any further anti-social behaviour by the perpetrator…can make them really suffer' (Int.29 (PO) Site A).

For a small minority (three out of the nineteen) of participants, however, it appeared that 'the norm is that if you are dealing with an adult, then you are going to inform the public' (Int.23 (PO) Site A). There was an impression that this seemed to be particularly the case with police officers when dealing with persistent offenders. One police officer noted the following: 'I think it is not necessarily a bad thing. I think that other people from the wider society have a right to know if somebody has breached the law in a sense and has certain conditions in order to safeguard and protect them' (Int.21 (PO) Site A). This officer then went on to explain that through this process the public are also made 'aware [of the conditions and] are able to notify the police that they breached' either their injunction or their CBO (Int.21 (PO) Site A).

In Site B, five out of the ten participants mentioned that certain pieces of information were only shared with those affected or likely to have been affected by the perpetrator's behaviour. As one local practitioner explained:

> We will always consider to who we are telling about this. We do not publicise things…so we told the estate what has actually been done because we obviously believed that everyone would have been affected because of the nature of the behaviour and because of where the behaviour was happening (Int.16 (LP) Site B).

As one interviewee noted, to publicise information to people who have not been affected by the perpetrator's behaviour 'would be a disproportionate' response (Int.17 (LP) Site B). Again, it was clear that the sharing of information was 'case specific' (Int.8 (LP) Site B). A risk-assessment was carried out in advance taking into consideration the impact of the perpetrators' behaviour and any personal issues they might be facing, such as 'mental health issues' (Int.8 (LP) Site B). One interviewee noted that in order for them to publicise the issue of an injunction the behaviour in question must have had a 'community impact' (Int.8 (LP) Site B). They stated, however, that their aim was to 'inform [the public] rather than to identify' the perpetrators (Int.8 (LP) Site B).

As far as the remaining five participants are concerned, there was an impression that 'the public at large need to be advised as well because clearly that person has not changed from all the efforts you have put in beforehand' (Int.22 (LP) Site B). The following statement is illustrative of this approach:

> It is incredibly difficult to prove that somebody has breached the sanctions that they have been placed upon them without the community taking ownership. It was never a particular popular

> concept across the country. You know the old 'name it and shame it'. You know posting people's pictures. Did it breach their human rights? My personal opinion is that the rights of the victims should be held at a higher level than the rights of the perpetrator…they solely engage in negative lifestyle which is having a bad impact upon everybody and people are getting frightened. So, I liked it when we could 'name and shame'. Put pictures on the internet, on a billboard or to the local press (Int. 9 (LP) Site B).

The above testimony is not to suggest that these aforementioned 'name and shame' methods were used in Site B. Rather, it is to illustrate that half of the participants from Site B were in favour of a broader approach in terms of how information about the perpetrator and their behaviour should be managed.

Moreover, the foregoing testimony is consistent with many other accounts which emphasised that these measures can hardly be monitored and for this reason local enforcement agents should 'rely on the community…to inform' (Int.17 (LP) Site B) them about any possible violations of the restrictions imposed on the perpetrators. In fact, it was clear from the evidence collected in both areas, that the limited availability of resources was one of the main reasons for publicising information about the perpetrators and their behaviour. As one police officer pointed out 'unfortunately, there are not enough of us to police every single injunction or CBO. So, we rely upon whoever sees or if the victim sees to come forward with the details of the breaches' (Int.13 (PO) Site B). According to one local practitioner this cooperation between the public and the local enforcement agents was vital because 'once [the perpetrators] realise that they can get away with it they are not bothering' (Int.1 (LP) Site A). Hence, it was stated that in order for these measures to be 'effective you have to advertise' (Int.10 (LP) Site B) them.

Although there was evidence to suggest that on a number of occasions information about the perpetrators was publicised to people who were not directly affected by their behaviour, this does not necessarily mean that the restrictions imposed on those individuals amounted to criminal punishment. As noted earlier, the *purpose* (or at least one of the purposes) of publicity must be the public condemnation of the individual at stake in order for the restrictions imposed on them to amount to criminal punishment.[38] The fact that certain pieces of information about the perpetrator were publicised will not automatically satisfy the second prerequisite of the working definition of criminalisation.

[38] See 3.2.2.

To illustrate the distinction between the two, let us consider the following two testimonies. When one of the participants was asked to describe the circumstances under which they would let the entire community know about the issue of an injunction his/her response was the following: 'it is something that we try, not in a negative way, to say that this person has got this and get the feeling to the public that to let them know that action has been taken against that particular person' (Int.27 (PO) Site A). Let us now compare the foregoing account with the following one:

> With adults we have gone a long further. We had deliberately put some articles in the [local newspaper]. That guy was extremely racially and homophobic abusive to a few people and this was not the first time he had done it and he had some previous convictions for racially aggravated offences…We did a press release in the [local newspaper] when we got an ASBO for him because it was really important. Members of the community who had experiencing hate incidents were there (Int.1 (LP) Site A).

Whilst both testimonies describe the circumstances under which information about the perpetrator was made available to the community at large, it is evident that only in the latter case the purpose or at least one of the purposes of publicising certain information was to publically condemn the perpetrator and his behaviour. Conversely, in the first case it is clear that the purpose of sharing information was to reassure the public that the ASB has been dealt with.

To illustrate how censure was communicated in the latter case let us a draw a parallel with *direct* criminalisation. As discussed earlier, *direct* criminalisation symbolises the intentional and unequivocal denunciation of certain kinds of wrongs by the state.[39] As Duff (2001) explains, through *direct* criminalisation a message is conveyed to society that the wrong proscribed is so blameworthy that needs to be publically condemned. This is not a wrong against the individual victim (if there is one), but a moral wrong against the entire society (Duff & Marshall, 2004). This is a wrong that violates some of society's core values and for this reason a collective response by the community is needed (Duff & Marshall, 2004). Seen in this way, those who are found guilty of an offence should be viewed by society as moral wrongdoers rather than as individuals who merely violated a legal rule (Ashworth & Horder, 2013).

[39] See 2.1.

As far as non-criminal legislation is concerned, the intention of the legislature is not to publically condemn the behaviour at stake. Censure, however, can still be communicated when state actors publically and purposefully condemn both the perpetrator and the behaviour in question. Although the ASBO constituted a civil order, it is evident that one of the purposes of the press release (second testimony) was clearly to publically condemn both the perpetrator and his behaviour.

Based on the data collected from both sites, in most of the cases information about the perpetrators was only shared with those directly affected by the behaviour in question as a means of facilitating the effective policing of the restrictions imposed. There was evidence to suggest, however, that on certain limited occasions the main purpose (or at least one of the main purposes) of information sharing was to publically condemn the perpetrators and their behaviour. In these limited cases the implementation of the ASB tools and powers satisfied both prerequisites of the working definition and thus constituted a form of *indirect* criminalisation.

5.2.4.3 Assessing the legitimacy of enforcement

Although it was evident from the data collected that in most of the cases the implementation of the injunction's first limb did not constitute a form of *indirect* criminalisation, we need still to focus on these few cases where both prerequisites of the working definition were satisfied. Similar to *direct* criminalisation, our starting point here should be to scrutinise the legitimacy of this form of criminalisation and whether this can be warranted.

*(i) Necessity and proportionality*

Although certain interventions could amount to an interference with the perpetrator's liberty, for most interviewees this interference was warranted because there was always a connection between the perpetrators' past behaviour and the restrictions/obligations imposed on them. For them, the objective of these interventions was not to 'prevent someone from having a normal life' (Int.19 (PO) Site A). Rather, their objective was to 'prevent them from conducting behaviour which is not acceptable' (Int.19 (PO) Site A). The following testimony provided by one police officer is illustrative of the majority's responses when asked about whether the restrictions imposed on the perpetrators result in the prohibition of otherwise lawful activities:

> If somebody has not stepped over the line they will be allowed to carry on doing what they were doing. If they have stepped over the line to a point where we feel that we need to have some kind of order on them, then yes it would stop them doing something that might be legitimate to them, such as walking down the high street (Int.14 (PO) Site B).

To support the justifiability of these restrictions, most of the participants emphasised the need for these to be deemed as *necessary* and *proportionate*. As one local practitioner noted:

> We always say 'Is it necessary to ask for that restriction?' and 'Is it proportionate to ask for that restriction?'. These are the two questions we will ask ourselves in the whole preparation that is what we will be asking ourselves. If we do not feel that we have the evidence to support and say 'yes' to both of these questions, then we would not have included them. So, if somebody is just committing anti-social behaviour in a particular street to exclude them from the whole city will not be proportionate (Int.4 (LP) Site A).

The foregoing accounts represent what the majority of the interviewees believed about the imposition of these restrictions. This finding, contradicts with some of the theoretical concerns raised earlier regarding the issue of the injunction.[40] The 2014 Act was criticised for imposing a lower threshold than the one imposed by the 1998 Act. Whilst under the 1998 Act an ASBO and the CrASBO could only be issued if it was regarded as a *necessary* means for the protection of those affected by the perpetrator's behaviour,[41] under the 2014 Act the issue of the injunction needs *only* to be regarded as a 'just and convenient' measure for the prevention of further ASB.[42] As far as the CBO is concerned, its issue needs *only* to 'help in preventing the offender from' behaving in a similar manner in the future.[43] Upon closer scrutiny of the findings of this study, it is evident that these criticisms do not reflect how the law had been implemented in the two sites under investigation.

To further support the need for these restrictions to be *necessary* and *proportionate*, many of the participants claimed that applying successfully to court for the issue of an injunction or a CBO is not an easy task. Instead, according to them, they 'need to justify' (Int.15 (PO) Site A) these restrictions because ultimately the decision to

[40] See 4.1.2.
[41] Section 1 and section 1C respectively.
[42] Section 1(3).
[43] Section 22(4).

'impose certain restrictions on someone' lies with the court (Int.2 (LP) Site A). One interviewee noted, for instance, that in order to apply successfully to court 'you have to have hard core evidence and you have to have hard core statements. So, it is not an easy process to do. And you are not going to do it unless you can push it forward' (Int.11 (PO) Site B). As one local practitioner explained, 'we would not use the injunction … to shove a lot of things that are not actually relevant and judges are very strict on that. We would not even be able to bring that up. You would be hugely criticised' (Int.16 (LP) Site B).

The last two testimonies are consistent with the earlier finding of this study regarding the presence of a review procedure in both sites. As mentioned above, in both sites a multi-agency approach was adopted not only in terms of how ASB is to be conceptualised, but also in terms of how local enforcement agencies tried to address this kind of behaviour. Evidence collected by this study revealed that this multi-agency approach also extended to the restrictions and/or obligations that local enforcement agents sought to impose on those who behaved in an anti-social manner. The following testimony provided by one police officer is illustrative of this multi-agency approach adopted in both areas: 'I will sit down with the Community Safety Team, with our colleagues and generally before we apply for a CBO we will have a professionals' meeting and we will come up with a list of prohibitions…that would suit that individual' (Int.23 (PO) Site A). According to another interviewee, this pre-enforcement process is not as straightforward as it might appear to be since 'it is notoriously difficult to get all the agencies to agree' to these restrictions and/or obligations (Int.28 (PO) Site A).

*(ii) The purpose of enforcement*

During the final section of the interviews, the research participants were asked about the purpose(s) that enforcement serves. Based on their responses two main purposes were identified: (i) the prevention of further ASB; and (ii) the rehabilitation of the perpetrator.

Twenty seven out of the twenty-nine interviewees noted that the primary objective of an injunction or a CBO is to 'try and prevent that behaviour, to try and stop that behaviour' (Int.18 (PO) Site A). As one interviewee explained 'if we are to punish somebody then we will find a law to do so … This, however, is prevention. This is an attempt to prevent a pattern of behaviour' (Int.11 (PO) Site B). These accounts are in line with the New Labour Government's position according to which the ASB tools and powers 'aimed at stopping the problem behaviour, rather than punishing the offender'

(Home Office, 2003: 6). Regardless of the preventive nature of these measures, criminal law theorists should not be averted from examining whether the implementation of these measures resulted in the indirect criminalisation of certain kinds of ASB. As far as local enforcement agents are concerned, they should constantly be mindful of the potential implications of these restrictions on people's lives.

The second major objective identified through the data collected was the rehabilitation of the perpetrators. Seventeen out of the twenty-nine interviewees stated that enforcement was used as a means of working with the perpetrator in order to address the underlying causes of their behaviour. As the following testimony illustrates, if the perpetrator refused to utilise the services provided to them, then local enforcement agents could apply for the issue of an injunction or a CBO on purely paternalistic grounds: 'For me is about using enforcement as a tool to get people to engage in social care and make significant sustainable changes in their life style. That is the only way it will sit comfortably with me' (Int.3 (LP) Site A). As another local practitioner noted that obtaining an injunction or a CBO is not a panacea for addressing the underlying causes of ASB: 'if we know that someone would never stick to anything, then we would never want to set up someone to fail' (Int.20 (LP) Site A). Rather, based on their account these measures should only be used if there is a realistic prospect of success.

At first sight, the use of these measures on purely paternalistic grounds can be criticised for denying perpetrators the opportunity to reject treatment. This finding, however, should be examined in light of the multi-agency approach adopted in both sites. As mentioned earlier, the adoption of a multi-agency approach is a very positive development because incidents of ASB were examined from various perspectives.[44] Participants to these multi-agency meetings had different skills, backgrounds and experience all of which were brought together in order to reach to a collective decision as to the best way forward.

Finally, the research participants were asked whether the use of formal legal action was used as a means of punishing those who acted in an anti-social manner based on their own understanding of punishment. For twenty three out of the twenty-nine interviewees, the restrictions imposed on the perpetrators did not amount to punishment. The following testimony provided by a local practitioner is illustrative of the majority's responses on

[44] See 5.2.3.2.

this question: 'I have never thought an ASBO as a punishment for an individual. I always thought it as a means to protect individuals and the wider community from the behaviour of somebody' (Int.9 (LP) Site B). The foregoing testimony is consistent with the majority's belief based on which the main reason for resorting to enforcement was to prevent the perpetrator from behaving in the same manner in the future.

For the remaining six interviewees, the restrictions imposed on those who received an injunction or a CBO were 'quite punitive' (Int.1 (LP) Site A) or included an 'element of punishment' (Int.7 (LP) Site A). As to the former, one police officer argued that the implementation of the relevant legislation 'can be quite punitive' because it enables local enforcement agents to address ASB 'as if it was an offence' (Int.21 (PO) Site A). As to the latter, three interviewees noted that 'although [the imposition of these restrictions] is a punishment in a sense', their main objective was 'to support and divert people from' ASB (Int.10 (LP) Site B).

It was evident by the data collected from both sites that the decision as to the imposition of certain restrictions/obligation on those who behaved in an anti-social manner was clearly informed by the principles of *necessity* and *proportionality*. Moreover, it was clear that the intention of the majority of the interviewees was to use these measures as a means to prevent further ASB and criminality by the perpetrator in question. Most of them were also quick to dismiss the claim that these measures were used as a form of punishment. However, for some, there remained scope for these measures to be used as a means of *partly* punishing perpetrators of ASB.

**Conclusion**

This empirical study has revealed that the decision to classify someone's behaviour as anti-social was informed by a number of factors which partly compensated for the apparent broadness of ASB's statutory definition. More precisely, three main factors have been identified. First, it was evident that the prime factor determining whether someone's behaviour should be deemed as anti-social was its impact on other people's lives. Although for most of the participants the flexibility of ASB's statutory definition was vital, there was evidence to suggest that this increased public's expectations as to the ambit of the law. Secondly, another important factor was the amount of resources available to local enforcement agents to address ASB. Based on the evidence collected, the limited availability of resources led local enforcement agents to raise the severity

threshold that a particular incident must have met in order for it to be classified as anti-social. Thirdly, it was clear upon closer scrutiny that in both sites there was a review mechanism in place which ensured that totally irrational and/or unsubstantiated complaints were dismissed. Although focusing on the impact that someone's behaviour had on others appears to impose no barriers to the reach of the ASB tools and powers, it was evident from the data collected that the behaviour dealt with through these measures was really impactful and in most of the cases persistent.

Another important finding of this study relates to the repeal and replacement of the ASBO by the new civil injunction under Part 1 of the 2014 Act. For most interviewees, the abovementioned change in legislation barely affected the daily administration of ASB. As noted by most of them, the ASBO was one out of many mechanisms that could be invoked against those whose behaviour was deemed problematic. So viewed, local enforcement agents can simply choose a different mechanism of social control if the injunction cannot adequately address the behaviour at stake.

For many interviewees, however, this shift towards a purely civil method of social regulation was approached with great deal of scepticism. For them, the hybrid nature of the ASBO acted as a good bargaining tool since the imminent threat of prosecution and the imposition of a lengthy custodial sentence was very effective in terms of deterrence. Consequently, the abandonment of this hybrid form of regulation was an unfortunate development for them. Some also noted that the move to a civil injunction led to a shift of attention towards the CBO. It will be instructive to examine therefore whether this shift toward a purely civil approach will eventually force local enforcement agents to rely solely on the CBO.

As far as the procedure followed after someone's behaviour was classified as anti-social is concerned, this study has revealed that this was primarily risk-driven. Initially, a risk assessment would be conducted in order to determine the level of risk faced by the victim. The outcome of this assessment would inform the procedure followed by local enforcement agents. High-risk incidents, for instance, were regarded as priority and were discussed at the local multi-agency meetings. There was also strong evidence to suggest that enforcement was not kept as last resort measure for high-risk incidents.

It is also worth noting that in both sites there was a shift towards a more RJ approach with regard to the administration of ASB. Most of the interviewees noted that

prior to taking any formal legal action against the perpetrator they would seek to address the behaviour at stake through a RJ process, primarily victim-offender mediation. This was an unexpected discovery since a previous study on the implementation of the ABCs and the ASBOs found that local enforcement agents aimed to address ASB primarily by threatening those who lived in rented accommodation with eviction or by moving to the next tier of the 'pyramidal system of regulation' (Lewis, Crawford, & Traynor, 2016: 6).

The final set of findings relates to whether the implementation of these measures resulted in the *indirect* criminalisation of certain kinds of behaviour. More precisely, it relates to the obligations/restrictions imposed on those against whom an injunction or a CBO was issued and whether these constitute a form of criminal punishment. As far as the first prerequisite of the working definition of criminalisation is concerned, there was evidence to suggest that on many occasions the imposition of certain restrictions indeed interfered with perpetrators' liberty. As far as the second prerequisite of the working definition is concerned, it was clear in both sites that for the majority of the interviewees publicising information about the perpetrators should be confined only to those directly affected by their behaviour. According to them, extensive information sharing should be reserved for the most serious cases where the perpetrator's behaviour had a wider impact on the community. This was particularly the case when dealing with young persons. It should be remembered, however, that publicising certain information about the perpetrator did not automatically satisfy the second prerequisite of the working definition. This was only satisfied in a limited number of cases where the purpose or at least one of the purposes of information sharing was to publically condemn the perpetrators and their behaviour.

The final set of findings relates to the legitimacy of this form of regulation. From a theoretical perspective, if the implementation of these measures constitutes a form of criminalisation, we must then evaluate them as criminal rules. In order to assess the legitimacy of these interventions, particular attention was paid to the intentions of local enforcement agents with regard to the implementation of these measures. In both sites, for the majority of the interviewees the prevention of further ASB was the primary reason for applying to court for the issue of an injunction or a CBO. An equally important objective for them was the rehabilitation of the perpetrator. For the majority of the research participants the abovementioned objectives had to be achieved only through the

imposition of restrictions/obligations which would adhere to the principles of *necessity* and *proportionality*.

Based on the findings of this study, it would be unjustifiable to conclude that localised criminal codes were created through the implementation of ASB tools and powers. In both sites under study, the implementation of these measures rarely constituted a form of *indirect* criminalisation. Nevertheless, the study did expose the potential for indirect criminalisation in some cases. As such further reflection on the factors that have contributed to this outcome is required, and, in turn, the formulation mechanisms through which indirect criminalisation can be prevented.

# Chapter 6: An evidence-based analysis of the law on anti-social behaviour

In Chapter 5, the findings of the empirical study conducted in two counties in England with local practitioners and police officers were presented. The primary objective of the empirical study was to obtain an enhanced understanding of the implementation of the injunction's first limb and ultimately examine whether this has resulted in the creation of localised criminal codes. It was evident from the data collected that in *most* instances the implementation of the injunction's first limb did not amount to criminalisation as this was defined in chapter 3. Nonetheless, it is still necessary to reflect on those instances where certain kinds of behaviour have been criminalised indirectly and examine how this can be prevented in the future.

This chapter is structured in two parts. The first part focuses on the minority of cases where ASB may be indirectly criminalised through the implementation of the relevant tools and powers. As illustrated in Figure 3.1, if there is evidence to suggest that the implementation of the injunction's first limb has resulted in the indirect criminalisation of certain kinds of behaviour, even in a minority of cases, then some kind of reform is needed in order to prevent this from happening in the future. In this part, three reform options are identified and analysed in depth bearing in mind the findings of this study and how likely it is for each of these options to be acted upon by the legislature.

The second part focuses on the implications of this study's findings as to our broader understanding of criminalisation. Particular attention is paid as to how the findings of this study can inform our understanding of criminalisation in general, and of over and under-criminalisation in particular. This further illustrates the importance of this thesis and its contribution to the current academic literature on criminalisation.

## 6.1 Preventing indirect criminalisation

In most of the cases explored within this study the restrictions and/or obligations imposed on those against whom the ASB tools and powers were used satisfied the first prerequisite of the working definition of criminalisation formulated in chapter 3, i.e. they interfered with the perpetrators' liberty. However, only in a few cases did the implementation of these measures *purposefully* lead to the *public* denunciation of the perpetrators in

question, i.e. the second prerequisite of the test. [1] One of the most illustrative cases used to demonstrate the indirect criminalisation of ASB was the one where local enforcement agents hold a press release and purposefully publicised articles on a local newspaper in order to publically condemn the perpetrator and his behaviour.[2]

Although in most of the cases the implementation of the ASB tools and powers did not constitute a form of indirect criminalisation, it is still important to reflect back on those minority cases where certain kinds of behaviour have been criminalised indirectly. The importance of this lies with the need to formulate mechanisms through which the indirect criminalisation of ASB can be prevented in the future. [3]

Indirect criminalisation is morally problematic primarily for two reasons.[4] First, this form of social control allows for the imposition of criminal punishment in the absence of the enhanced procedural protections provided to those facing criminal prosecution. As Husak maintains, criminalisation is the most coercive method of social regulation primarily due to the nature of the sanctions imposed on those who commit criminal wrongs (Husak, 2011). Accordingly, additional procedural protection should be afforded to those facing criminal prosecution. Moreover, as Henry and King (2016: 8) explain, the imposition of criminal punishment in the absence of the enhanced procedural protections is morally problematic because it undermines the rule of law, i.e. a set of normative 'standards that ought to be applied and maintained'. [5] Based on their account, these standards include amongst other certain 'minimal procedural standards that politics and law are required to uphold' (Henry & King, 2016: 18). What is important about these 'minimal procedural standards' is that they put in place (and guarantee) certain limits on the ability of the state to impose criminal punishment (Henry & King, 2016).

Secondly, indirect criminalisation undermines the moral distinction between the criminal law and other forms of social control used by the state.[6] In order to maintain this

[1] See 5.2.4.2.
[2] See 5.2.4.2.
[3] See Figure 3.1.
[4] See 'The pre-2014 approach to anti-social behaviour'.
[5] Henry and King (2016) are referring here to instances of under-criminalisation where hybrid methods of social control (such as the CBO) are used to address behaviour which is already proscribed by criminal law. Their argument is readily applicable in this context as well since criminal punishment can be imposed through the injunction's first limb in the absence of the 'enhanced procedural protections'.
[6] See 2.1.

moral distinction, it is essential for the criminal law to remain 'importantly dissimilar from other kinds of law' (Husak, 2004: 211).

In 6.1, three possible reform options will be presented and analysed, taking into account various factors including the need to address persistent low-level criminality and ASB, the findings of the empirical study, how courts sought to address rules susceptible to indirect criminalisation and the working definition of criminalisation formulated in chapter 3.

6.1.1 First reform option: Repeal and replace the injunction

Since there is evidence to suggest that the implementation of the ASB tools and powers has resulted (at least on some limited occasions) in the indirect criminalisation of certain kinds of behaviour, it could be argued that it is necessary for the legislature to repeal and replace the injunction's first limb. Central to this new legal framework should be the prevention of indirect criminalisation.

Any new or reformed injunction should ensure that the restrictions/obligations imposed on those against whom the ASB tools and powers are used do not satisfy both prerequisites of this thesis's working definition of criminalisation. Although it might be impracticable to prohibit the imposition of restrictions/obligations that could potentially satisfy the first prerequisite of the working definition (i.e. interference with the perpetrator's liberty),[7] this new legal framework can impose constraints on the *public* and *purposeful* denunciation of the perpetrators by the relevant state actors (i.e. the second prerequisite).

The new legal framework, for instance, could prohibit the publication of any information about the perpetrator unless permission from the court with certain conditions is granted. This will be similar to the procedure followed by local enforcement agents when applying for a power of arrest to be attached on an injunction.[8] The institution applying for permission to publicise information about the perpetrator and the restrictions/obligations imposed on him will need to convince the court that this is

[7] As discussed earlier, there is no need for the restriction/obligation imposed on the perpetrator to severely interfere with his liberty in order for the first prerequisite of the working definition of criminalisation to be satisfied. Mere interference with the perpetrator's liberty will be sufficient. Consequently, it will be almost impossible for the legislature to amend the 2014 Act in a way that the restrictions/obligations imposed on those who behave in an anti-social manner will not satisfy the first prerequisite of the working definition. For this reason, it would be more sensible to focus on the second prerequisite. See 3.2.1 and 3.3.1.

[8] For more on this issue see 4.1.2.

necessary for the *policing* of the order as opposed to the public condemnation of the perpetrator. In their application, local enforcement agents should provide a detailed account of how this information will be communicated and to whom. If the court is convinced that indeed the publication of certain information about the perpetrator and the restrictions/obligations imposed on him is necessary, proportionate and that its purpose is not to publically condemn the perpetrator, then permission should be granted.

The pressing question is whether the abovementioned recommendations can realistically be implemented by the legislature. Clearly, for these recommendations to be acted upon extensive reform of the current legal framework is required. Such a reform process is likely to severely restrict local enforcement agents' discretion regarding the implementation of the injunction. This will inevitably undermine the flexibility and possibly the effectiveness of the ASB tools and powers, something which is in stark contrast with the Government's promise for 'faster and more effective powers' (Home Office, 2012: 3). Moreover, as the findings of this study suggest, a flexible legal framework, both in terms of how ASB is to be conceptualised and in terms of the nature and extent of the restrictions/obligations imposed on the perpetrators, is essential for local enforcement agents.[9] It enables them to address behaviour that really has an impact on their local communities and it allows them to tailor their response in order to deal with the underlying causes of ASB. [10] As such, political will to act upon these recommendations may be in short supply. It should also be borne in mind that the existing tools and powers have been recently amended through the 2014 Act. In the current political climate, it seems highly improbable that this first reform option would be taken up by the legislature.

6.1.2 Second reform option: Amending the current legal framework

Although a complete departure from the existing legal framework appears unlikely to be taken forward, a more viable option could be to amend the current legal framework. As discussed earlier, one of the main concerns raised about indirect criminalisation is the imposition of criminal punishment in the absence of the enhanced procedural protections. [11] Hence, instead of replacing the existing legal framework on ASB, an alternative solution could be to ensure that those facing the prospect of criminal punishment are

[9] See 5.2.1.2.
[10] See 5.2.4.2.
[11] See 'Introduction'.

afforded all of these enhanced procedural protections given to those who are prosecuted for the commission of an offence. This can mitigate against some of the concerns raised earlier regarding the indirect criminalisation of certain kinds of ASB.[12] Although, in theory, the implementation of the injunction's first limb could still result in the imposition of criminal punishment, this will not be in the absence of the enhanced procedural protections.

In order for the full enhanced procedural protections to be provided two reform options can be acted upon. First, the 2014 Act can be amended in a way that in proceedings for the issue of an injunction and/or a CBO all of the enhanced procedural protections are afforded to the defendant. In effect, this will mean that every criminal procedural and evidential rule will need to apply. As a result of this, the relevant authority that applies for the issue of an injunction (or the prosecution in the case of a CBO), for instance, will not be able to submit hearsay evidence in order to prove that the defendant behaved in an anti-social manner. Although this appears to be warranted in cases where there is evidence to suggest that the relevant authority in question systematically applies the injunction's first limb in a manner that satisfied both prerequisites of the working definition, it should be borne in mind that the implementation of the ASB tools and powers can vary considerably across the country.[13] Moreover, it should be remembered that one of the main reasons which led to the introduction of the ASBO was criminal law's procedural and evidential rules which imposed many obstacles for local enforcement agents dealing with ASB and low-level criminality.[14]

Perhaps a more viable option which does not require any legislative amendments, is for the courts examining the issue of an injunction (or of a CBO) to utilise the working definition of criminalisation formulated in chapter 3. To illustrate how this can work in practice consider the following hypothetical. Suppose that a CSP decides to apply for the issue of injunction against Sam. The court examining the application for the issue of the injunction will need to assess how the CSP has implemented the injunction in the past. This assessment should be conducted with reference to this thesis's working definition of criminalisation. If there is evidence to suggest that the CSP in question has implemented

[12] See 'The pre-2014 approach to anti-social behaviour'.
[13] See 4.2.2.
[14] See 'The pre-2014 approach to anti-social behaviour'.

the injunction's first limb in a manner that satisfies both prerequisites of the working definition, then all enhanced procedural protections should be afforded to Sam.[15]

The above is not to suggest that CSPs can freely implement the injunction or any other ASB measure in a manner that results in the indirect criminalisation of certain kinds of behaviour as long as the enhanced procedural protections are provided to the perpetrators. As discussed earlier, indirect criminalisation should also be prevented due to the fact that it undermines the moral distinction between the criminal law and other methods of regulation.[16] Rather, it is to argue that since we are unable or unwilling to repeal and replace the injunction, then it is essential to put in place mechanisms which will ensure that criminal punishment is only imposed in cases where the full enhanced procedural protections have been provided.

Although this option does not undermine the flexibility of the ASB tools and powers (at least not to the extent that the first reform option does), it is also unlikely to be adopted. As discussed during the evaluation of this thesis's working definition of criminalisation, courts are unlikely to adopt such a test because this will require a detailed analysis of how the injunction has been implemented in the past.[17] This can be particularly problematic in cases where there has been a mixed implementation of the injunction's first limb. Instead, as cases like *Engel* and *McCann* illustrate, courts are more likely to favour a universally applicable solution, such as the anti-subversion doctrine.[18]

### 6.1.3 Third reform option: Code of practice

Thus far, two possible reform options have been presented and analysed. These options required either a complete or a partial reform of the current legal framework on ASB. Although both of these options are capable of preventing the injunction and the CBO (the first limb of each measure) from operating as *de facto* criminal rules, it has been argued that neither option is likely to be adopted by the legislature. The main reason for this is that both options are expected to undermine the flexibility and/or effectiveness of the existing tools and powers.

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[15] It will be for Sam to produce any relevant evidence to convince the court on the balance of probabilities that the CSP has in the past implemented the injunction's first limb in a manner that satisfied both prerequisites of the working definition of criminalisation.
[16] See 2.1.
[17] See 3.3.1.
[18] See 'The pre-2014 approach to anti-social behaviour' and 3.1.2.

A more viable option would be to retain the existing legal framework and try to prevent indirect criminalisation through a code of practice for local enforcement agents. This is not only capable of preventing indirect criminalisation, but it can also contribute to the consistent application of the relevant statutory provisions whilst retaining a flexible legal framework. To this end, we can reflect back on the data collected and the majority of cases where the implementation of the ASB tools and powers did not result in the imposition of criminal punishment in order to identify factors which can potentially prevent the indirect criminalisation of ASB. These factors can assist us to formulate policies through which indirect criminalisation can be prevented. These policies can form the basis of this code of practice and inform the implementation of these measures at a local level.

It has to be noted from the outset that the Home Office (2014) has already published its Statutory Guidance to local enforcement agents regarding the implementation of the ASB tools and powers. The Statutory Guidance provides guidelines about the instruments included in the 2014 Act and the procedure that must be followed when these are applied in practice. Thus, the pressing question is whether a code of practice is really necessary. The code of practice proposed below is a universally applicable instrument formulated with reference to the findings of this study and deals explicitly with the issue of indirect criminalisation.

#### 6.1.3.1 Multi-agency approach

It was evident upon closer scrutiny of the data collected from both sites that in most of the participating institutions there was a review procedure in place. This review procedure was both internal and external. As to the former, most of the interviewees pointed out that 'it is not just one officer on their own' (Int.12 (PO) Site B) who decides whether someone's behaviour is anti-social and whether they should apply for the issue of an injunction or a CBO. The procedure followed by local enforcement agents was largely determined by the outcome of the risk assessment carried out after a potential incident of ASB was reported to them.[19] After the initial assessment conducted by the 'call taker' (Int.21 (PO) Site A), the case was then assigned to an ASB officer who would review this incident further. As pointed out by one police officer, the next step is for the case to 'be referred to [the] supervisor who will then confirm that grading' (Int.19 (PO) Site A). It

[19] See 5.2.3.1.

was clear that they were a number of review layers throughout this process in order to make sure that the administration of these tools and powers adhered to the guidelines issued by 'people in high command' (Int.15 (PO) Site A).

The presence of these internal review procedures cannot necessarily guarantee that the sanctions imposed on those against whom the ASB tools and powers are used do not amount to criminal punishment. This is the main reason why the factors discussed in 6.1 should not be examined in isolation, but as integral and interconnected parts of future ASB strategies at a local level. If the right policies (i.e. policies that include the other two factors as well) are put into place, these internal review procedures will enable the relevant institutions to apply these measures consistently whilst ensuring that this does not result in the indirect criminalisation of certain kinds of behaviour.

As to the latter, reference was made by most interviewees to the local multi-agency meetings held on a regular basis. The main objective of these meetings was to review high-risk cases.[20] It was evident through the data collected that these multi-agency meetings provided a forum for local enforcement agents where they could bring together their different sets of skills and expertise. This allowed for a more holistic examination of the ASB at stake adding at the same time an extra layer of review. The presence of this review mechanism is reflected by the following testimony given by one local practitioner who noted that enforcement 'is a lengthy process … because you have a number of people who are considering the evidence at different levels and they require a significant level of evidence if you are going to court' (Int.24 (LP) Site A).

It was evident from the data collected by this study that in both sites this multi-agency approach extended beyond mere information sharing agreements. Rather, it included policy planning and decisions taking as well. Although this can potentially cause delays in the administration of ASB, the potential benefits of a multi-agency approach should not be overlooked.

6.1.3.2 Focus on the underlying causes

Another important factor that appears to have set barriers to the creation of localised criminal codes through the implementation of the relevant legislation was the fact that most of the interviewees acknowledged that in many cases ASB involved complex

[20] See 5.2.3.2.

situational and contextual causal variables. For many interviewees ASB was viewed as being the result of deep-seated social problems that required careful attention. This led them to the realisation that a purely enforcement driven approach is not always the answer to ASB. Rather, the administration of ASB should be complemented by an attempt to address the underlying causes of this behaviour. Central to this realisation was the need to work with the perpetrators in order to divert them away from criminality and/or ASB.[21] Consequently, there was a shift towards a more social care driven approach as a means of providing the perpetrators with the necessary support needed in order to tackle what really causes them to act in an anti-social manner. As many research participants pointed out, some of the main causes of this behaviour included alcoholism, drug misuse and other socio-economic problems which created a vicious circle of ASB and criminality.

Although most of the interviewees highlighted the limited availability of resources, it was evident through the data collected that their intention was to manage these resources as effectively as possible in order to formulate 'a support network' (Int.11 (PO) Site B) for the perpetrators. This was further evident by the readiness of local enforcement agents to contact other local service providers that 'can be involved in order to get them the kind of support they need' (Int.27 (PO) Site A). The foregoing testimony of course is intertwined with the need for a multi-agency approach both in terms of decision taking and information sharing. On this view, local service providers and the various institutions dealing with ASB need to work closely together in order to properly identify and address what really causes the perpetrator's behaviour. The close cooperation between the various institutions that participated in this study was fundamental to the adoption of a 'social care driven … rather than a top-down penalisation' (Int.1 (LP) Site A) approach in the sites under investigation.

Central to the proposed code of practice, therefore, should be the need for local enforcement agents to focus on the underlying causes of ASB and criminality. Although this can still result in the imposition of restrictions/obligations that interfere with the perpetrators' liberty, the adoption of a social care driven approach is unlikely to result in the public and purposeful condemnation of those individuals. Local enforcement agents will focus on how they can best address the underlying causes of the perpetrator's behaviour, rather than to publically and purposefully condemn him.

[21] See 6.2.2.

6.1.3.3 Contemplating the impact of enforcement

Another decisive factor that contributed towards a more social care driven approach to ASB was the fact that many local enforcement agents planned their strategies whilst contemplating what the potential implications of their actions on the perpetrator would be. As the following testimony illustrates before applying to the court for the issue of an injunction or a CBO, local enforcement agents tried to design the proposed obligations/restrictions in a manner that would not pose barriers to the perpetrator's needs: 'It has to be specifically related to their offending behaviour. You know you cannot just say "You cannot go to retail shops because you are a shoplifter". That person is going to say: "How am I supposed to buy my shopping?"' (Int.26 (PO) Site A). This need to consider what the potential implications of their decisions on the perpetrator could be, was particularly prevalent when deciding the level of publicity required for each case. For the majority of the research participants, information about the perpetrator and the obligations imposed on them should only be shared with those who 'need to know… [If] the decision is made to go public if other people, agencies or partnerships have objections about the effect that this might have on the client we will have a discussion about it' (Int.5 (LP) Site A).[22]

By contemplating the potential implications of their decisions, local enforcement agents will be able to move away from a censure oriented approach towards a social care driven strategy of addressing ASB and criminality. It is necessary to ensure, however, that this shift towards a social care driven approach is consistently followed by all local enforcement agents.

Although allowing local enforcement agents to determine what constitutes ASB and how this can best be addressed can result in the creation of localised criminal codes, it was evident through this study that a certain degree of flexibility is vital. As evidence from this study suggests, ASB can take various forms and on many occasions it is the direct result of a number of other situational factors. It is, therefore, imperative for local enforcement agents to tailor their response based on the specificities of each case. Whilst the current law on ASB provides local enforcement agents with the necessary means to achieve this, it is still necessary to ensure that the implementation of the relevant statutory provisions does not result in the indirect imposition of criminal punishment. This can be

[22] See 5.2.4.2.

achieved through the formulation of a code of practice explicitly designed to provide guidance to local enforcement agents regarding the implementation of the ASB tools and powers. This code of practice should be structured around the three factors that have been identified above and which are capable of preventing indirect criminalisation.

An integral part of this code of practice should be the presence of a review procedure in every institution dealing with ASB. This procedure should include several layers of review and be both internal and external ensuring that the relevant tools and powers are used in a non-arbitrary and consistent manner. At an internal level, this review procedure is also capable of promoting professional accountability. At an external level, this will result in the adoption of a multi-agency approach which will enable local enforcement agents to combine their knowledge and expertise leading to a more comprehensive understanding of the perpetrators' behaviour and needs. This multi-agency approach should not be limited to information-sharing agreements, but it must also include a close collaboration between the various institutions and collective decision taking.

Moreover, the code of practice must include policies which will state explicitly that the primary objective of the ASB tools and powers is to tackle the underlying causes of the perpetrators' behaviour and that these measures should not be used as a means of punishment. It is necessary to emphasise that a purely enforcement-led approach is unlikely to permanently address the ASB in question. Each restriction and obligation imposed should be tailored to address the underlying causes of ASB. It is also important for local enforcement agents to be constantly mindful of the potential implications that their decisions might have on the perpetrators' lives. These will provide clear guidance to CSPs about the factors that should be taken into consideration before applying for the issue of an injunction or a CBO.

The presence of a code of practice will not only bring clarity and consistency to the implementation of the ASB tools and powers, but it is also capable of permanently shifting emphasis towards a more social care driven approach.

### 6.2 Theoretical implications: Over and under-criminalisation

After elaborating on how the indirect criminalisation of certain kinds of ASB can be prevented in the future, it is instructive to reflect back on the findings of this study and examine their impact on our theoretical understanding of criminalisation. In particular, I

will focus on how the findings of the study contribute to the academic debates on over and under-criminalisation.

### 6.2.1 Over-criminalisation: Assessing the reach of punitive interventions

In recent years, some of the most prominent legal philosophers in the area of criminal law, such as Husak (2008b), raised concerns about the current status of the criminal law and whether there has been a substantial departure from its moral foundations. Husak (2014), for instance, contends that there is a tendency for the legislature to criminalise behaviour which is already prohibited by criminal law and thus creating a substantial number of overlapping offences. Ashworth (2000) has been critical of the vast number of new criminal offences introduced each year something which, according to him, undermines the importance of the criminal law. According to Husak (2003-2004), the vast number of offences can be attributed to the politicisation of the criminal law. Based on his account, what is concerning about the politicisation of the criminal law is that it is used as a first rather than as a last resort measure (Husak, 2004). Others, such as Duff (2010), have raised concerns about the introduction of the civil preventive measures, especially the ASBO.[23] These concerns are often associated with what is known as the phenomenon of over-criminalisation, i.e. to introduce new offences without providing adequate justification as to their necessity (Husak, 2008b).

Chalmers (2014) sought to categorise the factors which have allegedly contributed to this over-criminalisation crisis. Based on his account, legal scholars' concerns regarding over-criminalisation tend to focus on three main pillars. First, academic criticisms focus on the 'overuse of the CJS' (Chalmers, 2014: 488). Here, reference is made to the number of new offences enacted every year. Secondly, another cause for concern is the 'inaccessibility of the criminal law' (Chalmers, 2014: 485). As Chalmers (2014: 485) maintains, there is currently so much criminal law that it has become 'inaccessible to those who are expected to adhere to its structures', those whose behaviour might potentially fall within the ambit of the criminal law are not sure whether what they are doing constitutes an offence or not. Thirdly, the criminal law has been criticised for being absurd, that there is no logic behind the criminalisation of certain kinds of behaviour either due to the fact that what has been criminalised is too trivial or because there was simply no need to introduce a new criminal offence (Chalmers, 2014).

[23] Duff was critical of the 'two-step' criminalisation process used by the ASBO.

For the purposes of this thesis, my analysis will focus only on the alleged 'overuse of the CJS' by the state in order to regulate our behaviour. It should be noted from the outset that the purpose of the following analysis is not to determine whether there is indeed an over-criminalisation crisis. Determining whether we have more criminalisation than what is actually necessary is a normative argument which is contingent upon someone's perception of criminal law's moral foundations and boundaries. Rather, the prime objective of the following analysis is to elucidate the implications of this study's findings on the debate on over-criminalisation.

As Chalmers (2014: 484) contends, 'the sheer volume of statutory material produced in the UK is remarkable, and appears to have grown very substantially in the second half of the twentieth century'. Data presented by a number of recent studies suggest that a rather large number of new offences are enacted in this jurisdiction every year. According to the Law Commission (2010), between 1997 and 2010 more than 3000 new criminal offences have been enacted in England and Wales. The Commission's findings are based on an examination of Halsbury's statute books which have expanded significantly in recent years, reaching the conclusion that this is evidence of criminal law's expansion (Law Commission, 2010).

Chalmers and Leverick's (2014) research findings suggest that in 1997-1998 and 2010-2011 alone more than 3000 new offences were created. Their overriding objective was to compare the number of offences created during the first year in government of the New Labour (1997 – 1998) and of the Coalition Government (2010 – 2011) (Chalmers & Leverick, 2014). Based on their findings, between 1997 and 1998, the New Labour Government enacted in total 1395 offences; this includes both statutory instruments and primary legislation (Chalmers & Leverick, 2014). In the second period under scrutiny, the number of criminal offences created in the United Kingdom under Coalition's first year in office was 1760.[24]

Both of these studies acknowledged that it is extremely 'difficult to identify accurately the number of offences created by a piece of legislation' (Chalmers & Leverick, 2014: 59), making particular reference to the fact that the vast majority of the existing criminal offences were created by secondary legislation through powers

[24] It has been acknowledged that these figures do not represent the actual number of offences introduced in England and Wales during these time periods since not all of these offences extended to the entire United Kingdom (Chalmers & Leverick, 2014).

delegated to specialist bodies and institutions (Chalmers & Leverick, 2014; Law Commission, 2010). A systematic analysis of the existing criminal offences includes enormous difficulties both in terms of the methodology adopted and the resources required. This is evident by the ambiguities regarding the actual number of the existing criminal offences.[25] Another possible explanation can be the difficulty in determining what constitutes an offence, whether overlapping or duplicated offences should be counted as well, and how many, if any, offences are repealed through the introduction of a new offence (Chalmers & Leverick, 2014).

Does, however, the actual number of offences reflect the true extent of criminalisation in this jurisdiction? Relying solely on the number of offences as this appears on the statute book cannot provide us with an accurate account of the current extent of criminalisation in this jurisdiction. If the abovementioned hurdles in counting the exact number of offences can be addressed, then we will be able to measure the extent of *direct* criminalisation. Our assessment, however, will be incomplete without taking into consideration *indirect* criminalisation as well.

Although there has been a modest attempt by legal theorists to measure the current extent of criminalisation, their assessments rely on the assumption that criminalisation is restricted to what is formally classified as a criminal offence. This, however, presents a partial account of criminalisation since it overlooks the possibility of *indirect* criminalisation through the implementation of the civil preventive measures. The foregoing assertion is reaffirmed by the findings of this study which demonstrate that the implementation of certain civil measures, such as the injunction, can indeed result in the *indirect* criminalisation of certain kinds of behaviour.

It was also evident through this study that the implementation of these tools and powers can vary considerably from one area to another. Thus, we cannot simply include the ASB tools and powers into our assessment of the current criminal offences. Instead, a very detailed examination of how these legal rules apply in practices is needed. The above is neither to undermine the research done by criminal law theorists on over-criminalisation nor to confirm the existence of this phenomenon. Rather, it is to point out

[25] Compare, for example, the figures provided for the period between 2010 and 2011 by the Ministry of Justice (2012) and those provided by Chalmers and Leverick (2014).

that the civil preventive measures pose a significant barrier in assessing the true extent of criminalisation in this jurisdiction.

6.2.2 Reflecting back on under-criminalisation

At first sight the ASBO, the new civil injunction and other civil preventive mechanisms, such as the TPIMs, can be criticised for 'lower[ing] the threshold of intervention, formalis[ing] previous informal responses, intensif[ying] forms of intervention and hasten punishment' (Crawford, 2009). In theory, the civil nature of these measures enables law enforcement agents to take formal legal action against people whose behaviour would not previously warrant the use of the criminal law. To illustrate this, consider the following hypothetical. Suppose that Sam who is 12 years old used threatening language against Andrew. Although Sam's behaviour might have constituted an assault,[26] the CPS chose to take 'no further action' due to his age and because they believed that his conduct was part of everyday social interaction.[27] Although the CPS decided not to prosecute Sam for an assault, local enforcement agents dealing with ASB felt that his behaviour 'caused or is likely to cause harassment, alarm or distress' to other members of the community. For this reason, they decided to apply for the issue of an injunction against Sam through which he would be prohibited from using threatening language against other people.

The decision of local enforcement agents to apply for the issue of an injunction against Sam can be criticised for using the injunction as a substitute for criminal prosecution (Ramsay, 2004). As Ashworth and Zedner (2010) contend, to use the injunction or any other non-criminal method of social regulation as a means of addressing behaviour which is criminal in nature constitutes *under-criminalisation*. Although under-criminalisation has been briefly discussed earlier, it is instructive to revisit this issue in light of the findings of this study.[28] As noted before, at first sight under-criminalisation is contentious because: (i) it allows for the regulation of criminal behaviour in the absence of the enhanced procedural protections; and (ii) it erodes the normative distinction between the criminal and the civil law.[29]

[26] If Andrew apprehended immediate violence, then Sam's behaviour would have constituted an assault. See: R v Ireland [1998] AC 147, 150.
[27] CPS, 'Minor Offences'. Available from: http://www.cps.gov.uk/legal/l_to_o/minor_offences/#an03 [Accessed 18th May 2017].
[28] See 'The pre-2014 approach to anti-social behaviour'.
[29] See 'The pre-2014 approach to anti-social behaviour'.

Evidence collected by this study suggests that there is indeed an overlap between ASB and criminality.[30] When research participants were asked to provide examples of behaviour that they would regard as anti-social, they made reference to conduct which was already proscribed by criminal law, such as criminal damage, begging and assault. This finding was consistent with the findings of previous studies which found that these measures were sometimes used to address behaviour which fell within the ambit of the criminal law (Koffman, 2006; Crawford, Lewis, & Traynor, 2016). There is ample evidence to suggest, therefore, that on at least certain occasions some local enforcement agents used these measures as a substitute for criminal prosecution.

Notwithstanding the concerns raised above, under-criminalisation is not objectionable *per se*. To explain this further, consider the following hypotheticals. **A**, Sam, who is 15 years of age, is constantly intimidating most of his neighbours, but his prime target is Andrew. Some of Sam's neighbours notified the police regarding his behaviour and the fact that he targets Andrew. The police decided to investigate this further by asking Andrew about Sam's behaviour. Andrew corroborated what the others said about Sam's behaviour and stated that he felt harassed by it. Nonetheless, Andrew informed the police that he is too afraid to testify in court against Sam. If the police decide to apply for the issue of an injunction against Sam simply because there is lack of evidence to support a criminal prosecution, then the injunction will be used in this instance to circumvent the enhanced procedural protections afforded to those facing criminal prosecution.

**B**, Andrew was willing to give oral evidence in court against Sam. Instead of invoking the criminal law in this case in order to address Sam's behaviour, local enforcement agents decided to utilise the injunction due to the perpetrator's age. They perceived the injunction as a means of diverting Sam away from criminality. As one local practitioner stated, their ultimate objective when using the ASB tools and powers against behaviour which was criminal in nature was 'to [divert people away from criminality] rather than implementing the full power straight away' (Int.10 (LP) Site B). Similar to scenario A, the use of the injunction constitutes again a form of *under-criminalisation*. In scenario B, however, injunction is used as an intermediate form of regulation in order to diver Sam away from criminality.

[30] See 5.2.1.

The above is not to suggest that the use of the criminal law should *always* be used as a 'last resort' measure.[31] Rather, it is to suggest that under-criminalisation should not be dismissed outright.[32] At first sight, the use of these measures as an intermediate form of regulation through which those who behave in an anti-social manner and/or commit low-level offences are diverted away from criminality appears to be reasoned. In order for this proposition to survive close scrutiny, however, it is imperative to identify and defend a set of conditions under which civil preventive measures can be legitimately deployed as a substitute to criminal prosecution. An advocate of this theory, for instance, needs to identify the kind of offences which would qualify for under-criminalisation. Similarly, the proponents of this theory need to identify the kind of offenders for whom this intermediate form of regulation should be used, e.g. offenders with mental health issues. It is not my intention here to identify and defend a set of conditions that must be met in order for *under-criminalisation* to be warranted. Rather, my intention is to illustrate the impact of my empirical findings on the academic debate on under-criminalisation.

**Conclusion**

This chapter has reflected further on the findings of the empirical study and scrutinised their implications both at a theoretical and at a practical level. Central to this chapter has been the need to formulated mechanisms through which the indirect criminalisation of certain kinds of ASB can be prevented in the future. Although data collected from the empirical study suggests that the implementation of the ASB tools and powers has rarely resulted in the indirect criminalisation of certain kinds of behaviour, it was imperative to assess various reform options through which this can be prevented. To this end, three possible reform options have been identified and analysed. The first option requires the repeal and replacement of the current legal framework with a new set of provisions which will prevent the imposition of restrictions/obligations that would satisfy both prerequisites of this thesis's working definition of criminalisation. It has been argued that it will be almost impossible for the legislature to prevent the imposition of restrictions/obligations

[31] Based on Husak's (2004: 215-216) account, it is impossible to adopt a literal interpretation of the 'last resort' principle. For him, although we can formulate many alternatives to the criminal law, not every single one of them is a 'serious candidate for implementation'. To illustrate his argument, Husak provides an example based on which people would be permitted to 'smoke cigarettes [only] if they allowed their foreheads to be branded'. Similar to Husak's argument, when I make reference to non-criminal alternatives I am referring primarily to the injunction and any other pre-existing method of social control rather than to any possible future alternatives.

[32] For a more elaborated account on non-criminal alternative methods of social regulation, such as informal justice, see Matthews (1988).

that will not interfere with the perpetrators' liberty as this was defined in chapter 3.[33] Hence, attention should shift to how local enforcement agents can be prevented from publically and purposefully condemning those against whom these measures are used. Although the proposed amendments are capable of preventing indirect criminalisation, it has been concluded that the first reform option is unlikely to be implemented by the legislature because it will inevitably undermine the flexibility and possibly the effectiveness of these measures.

The second option presented places particular emphasis upon the need to provide those who face the prospect of criminal punishment all of those enhanced procedural protections afforded to those prosecuted for the commission of an offence. This reform option starts from the premise that if we cannot prevent the ASB tools and powers from operating as *de facto* criminal rules, then we need to ensure that at least all of the enhanced procedural protections are afforded to those subjected to these measures. A possible way to achieve this is for the courts to adopt this thesis's working definition of criminalisation. This will enable them to assess whether local enforcement agents have implemented these measures in a manner that resulted in the imposition of criminal punishment. If indeed the relevant local authorities consistently implemented the ASB measures in manner that satisfied both prerequisites, then the full enhanced procedural protections should be afforded to the alleged perpetrator. Although this reform option does not require any legislative amendments, it is also unlikely to be taken forward because this will require courts to examine closely how each CSP has previously implemented these measures.[34]

The final and most viable reform option presented requires the formulation of a code of practice for local enforcement agents. Apart from clarifying and maintaining the consistent application of the relevant tools and powers, the code should aim primarily at preventing the indirect criminalisation of ASB. This chapter reflected back on the findings of the empirical study in order to identify factors that have contributed to the prevention of indirect criminalisation and that can form the basis of this universally applicable code of practice. The three main factors identified included: (i) the adoption of a multi-agency approach which extends beyond mere information sharing agreements; (ii) the need to focus on the underlying causes of ASB; and (iii) the need to contemplate on the impact that enforcement is likely to have on the perpetrator. It has been argued that

[33] See 3.2.1.
[34] See 3.3.1.

these factors have significantly contributed to the adoption of a more social care driven approach in both sites under investigation. This departure from censure centred strategies is capable to prevent the indirect criminalisation of ASB through the implementation of these measures.

The second main issue discussed in this chapter relates to the implications that the findings of this study have on our theoretical understanding of criminalisation focusing primarily on the issues of over and under-criminalisation. As far as the former is concerned, it has been argued that if criminal law theorists wish to assess the true extent of criminalisation in this jurisdiction, then they should take into consideration both direct and indirect criminalisation. As this study revealed, it is possible for criminal punishment to be imposed through non-criminal legislation. As to the latter, it has been concluded that under-criminalisation should not be dismissed outright. Although the use of non-criminal legislation to address behaviour which is criminal in nature possesses a number of normative challenges, its use to divert people away from criminality appears to be reasoned. In order for this argument to survive close scrutiny, however, a complete theory of under-criminalisation is needed.

# Conclusion

The impetus for this thesis came from the introduction and the rise of the civil preventive measures. Of particular concern was the ASBO's hybrid nature which could, in theory, lead to the criminalisation of any kind of behaviour that was labelled as anti-social. Ramsay (2012) contends that what was in fact criminalised through the ASBO's second limb was the perpetrator's failure to reassure society that they do not pose any risk to their security. Ramsay's argument seems theoretically reasonable, but in effect the ASBO's hybrid nature provided the means to criminalise behaviour which appeared to be part of everyday human interaction. In theory, as Gil-Robles (2005) pointed out, the ASBO's two-step prohibition model enabled local enforcement agents to criminalise the behaviour of people 'who have incurred the wrath of the community' and thus lead to the creation of 'personalised criminal codes'.

The foregoing criticism should be examined in light of ASB's statutory definition which focuses on the actual and/or potential impact of someone's behaviour rather than on its true nature.[1] What appeared to be really contentious though was the first limb of the ASBO. Although in *McCann* (para. 72) the order was deemed to be civil in nature, the law, as this appeared on the statute book, allowed for the imposition of significant restrictions on the liberty of those against whom such an order was issued. As Duff and Marshall (2006) put it, these restrictions could be so severe that they could amount to a form of criminal punishment in their own right and thus lead to the *indirect* criminalisation of the behaviour in question. The importance of this lies in the fact that indirect criminalisation allows for the imposition of criminal punishment in the absence of the enhanced procedural protections afforded to those facing criminal prosecution. Moreover, indirect criminalisation is problematic because it undermines the normative distinction between the criminal law and other forms of social control used by the state to regulate our behaviour.[2]

The 2014 Act did little to mitigate against these concerns despite replacing the ASBO with a purely civil injunction.[3] Whilst under the 1998 Act the issue of an ASBO

[1] See 'Conceptualising anti-social behaviour under the current law'.
[2] See 2.1.
[3] See 4.1.2.

had to be *necessary* for the purpose of preventing further ASB, under the 2014 Act the injunction needs only to *assist* towards this end. Most importantly, the introduction of positive obligations means that first limb of the injunction can potentially be more restrictive than the ASBO.[4]

**Research findings**

One of the main reasons for conducting an empirical research on the implementation of the injunction's first limb was the possibility of using this measure as a means of creating localised criminal codes through which certain kinds of behaviour are criminalised indirectly without the need to resort to direct criminalisation.[5] This was partly attributed to numerous stories that made the headlines based on which the ASBOs were sometimes used to address what appeared to be behaviour which was part of everyday human interaction (Macdonald, 2006a). There were identifiable concerns about the 'name and shame' methods used in certain localities as a means of 'informing' local population about the issue of ASBOs and the behaviour of certain individuals.[6] A prime example of this was Guildford's 'wall of shame' where pictures of those against whom an ASBO was issued were posted for 'public information' (Squires and Stephen, 2005a: 523).

While many of the interviewees emphasised the possibility for misusing the relevant legislation, it was evident from the data collected through this study that the implementation of ASB tools and powers rarely constituted a form of indirect criminalisation. Instead, there was sufficient evidence to suggest that the implementation of these measures was mainly social care driven. This was attributed primarily to three factors. These factors include the extensive collaboration between the various institutions dealing with ASB at a local level,[7] the fact that local enforcement agents were contemplating the impact of enforcement on the perpetrators, and that central to the implementation of the relevant tools and powers was the need to address the underlying causes of ASB rather than pursuing a censure-based response.[8]

[4] See 4.1.2.
[5] See 4.2.2.
[6] See, for example, my analysis of *Stanley* in 4.2.2.2.
[7] The collaboration between the various institutions dealing with ASB and low-level criminality was not limited to information sharing agreements, but it also extended to decision taking with regard the overall management of ASB in their localities. See 5.2.3.2.
[8] See 6.1.

Taken together, most of the findings of this study managed to mitigate against many of the initial concerns espoused within the extant literature regarding the implementation of the ASB tools and powers. Nevertheless, it should be remembered that the findings of this study do not necessarily represent how the ASB tools and powers are implemented across England and Wales. Rather, as discussed earlier, the use of these measures can vary considerably from one area to another primarily due to the extensive discretion afforded to local enforcements agents regarding both the implementation and the scope of the law in this area.[9] This was also one of the main reasons why this thesis argued for a universally applicable code of practice through which clarity and consistency can be achieved with regard to the implementation of these measures.[10]

Another important limitation of the findings of this thesis relates to the fact that the empirical study focused only on those responsible for the implementation of the ASB tools and powers and thus failed to take into consideration the views of other important stakeholders, e.g. of those subjected to these measures and/or their lawyers. On this view, the findings of this study might have been different if the views of these other stakeholders were taken into account as well (e.g. if their accounts contradicted local enforcement's testimonies).

Interviewing perpetrators and/or their lawyers would have indeed enabled me to obtain a more holistic account of the implementation of the ASB tools and powers. Although at face value the above criticism appears to be reasoned, it is worth reiterating that the methodology adopted and the sample technique used for the empirical study were largely determined by the merits of my main research question and how it could be best addressed (Wilson & Sapsford, 2006). To explain this further, it is imperative to go back to the working definition of criminalisation formulated in chapter 3. Based on this working definition, a sanction imposed or threatened to be imposed amounts to punishment if: (i) it interferes with someone's liberty; and (ii) if it results in the *public* and *purposeful* condemnation of that individual. Clearly, by interviewing perpetrators I would have been able to determine whether the sanctions imposed on them satisfied the first limb of the working definition. However, I would not have been able to determine whether the *purpose* of the implementation was to *publically* condemn these individuals. As discussed above, only in cases where the implementation of the injunction by state

[9] See 5.1.
[10] See 6.1.3.

actors aims at the public denunciation of the perpetrators the second limb of the test will be satisfied. Although, therefore, interviewing perpetrators and/or other stakeholders would have been instructive in terms of studying how these measures were implemented, this would not adequately contribute to addressing the primary research question of this thesis.

Although the findings of this thesis are generally positive, this does not mean that the relevant legislation is need of no reform or that no mechanisms are needed in order to prevent the indirect criminalisation of ASB. As illustrated through Figure 3.1 and discussed in more detail in chapter 6, since the implementation of these measures has resulted, even in a minority of cases, in the indirect criminalisation of ASB, it is imperative to scrutinise various reform options through this can be prevented in the future. As part of my analysis three possible reform options have been identified and analysed in depth.

The most viable solution examined was the one which requires the formulation of a code of practice for local enforcement agents. This will be a universally applicable code of practice for local enforcement agents across England and Wales. Central to the proposed code of practice should be the need to prevent the indirect criminalisation of ASB. In order to give more content to this code of practice, I reflected on the majority of cases where the implementation of the ASB tools and powers did not result in the indirect criminalisation of certain kinds of behaviour. Through the close analysis of this study's findings the abovementioned factors that have contributed to the adoption of a social care driven approach have been identified. These three factors should form the basis of the proposed code of practice. The proposed code of practice will not only include policies that will prevent the indirect criminalisation of ASB, but it will also bring clarity and consistency to the implementation of the relevant tools and powers.

**Contribution to the academic literature**

This thesis provides an insight into the implementation of the new ASB tools and powers introduced under the 2014 Act. Despite the rich theoretical and empirical research on the implementation of the ASBO, this is the first empirical data collected (that I am aware of) on the 2014 amendments.[11] As discussed in 6.2, the findings of this study have

[11] See 5.1.

implications not only with regard to our theoretical understanding of ASB, but they also affect our broader understanding of criminalisation.

As to the former, the findings of this study challenge certain dominant narratives and misconceptions with regard to the implementation of ASB tools and powers, such as the expansion of the net of social control to merely offensive behaviour.[12] Although this might have been the case in the past (or still be the case in some areas), this study revealed that there was a review procedure in place which ensured that the relevant statutory instruments were implemented in a rational manner whilst adhering to the principles of *proportionality* and *necessity*.

As to our understanding of criminalisation, the contribution of this study to the current academic literature is threefold. First, it raised the issue of indirect criminalisation by pointing out the need to look beyond the labelled attached to the civil preventive measures and scrutinise their implementation. Initially, this was achieved through my theoretical analysis of the ASB tools and powers and how these can be implemented in a manner that can result in the indirect criminalisation of those subjected to these measures.[13] The importance of this theoretical analysis was later reaffirmed by the findings of this study according to which the implementation of ASB tools and powers resulted in some cases in the indirect criminalisation of certain kinds of behaviour. This finding challenges the preconception that criminalisation can only occur directly by formally labelling legal rules as criminal. It also highlights the need for criminal law theorists to formulate mechanisms through which we can identify and prevent indirect criminalisation (Steiker, 1998).

Secondly, my analysis of *indirect* criminalisation in conjunction with the findings of this study challenges conventional academic wisdom with regard to the phenomenon of over-criminalisation. For many decades, criminal law theorists have tried to determine the true extent of criminalisation by measuring the exact number of offences in this jurisdiction.[14] Despite their endeavours, it is evident through this study that even if there was common consensus as to the exact number of offences, it seems unlikely for this to represent the true extent of criminalisation in this jurisdiction. As this study has

[12] See ‘Conceptualising anti-social behaviour under the current law’.
[13] See 4.2.2.
[14] See 6.2.1.

illustrated, this can only be achieved if we include into our assessment both direct and indirect criminalisation.

Another important contribution of this study relates to the issue of under-criminalisation. For many prominent criminal law theorists, such as Duff (2007), Ashworth and Zedner (2010), under-criminalisation is the phenomenon where 'pseudo non-criminal' mechanisms of social control, such as the ASBO, are used by the state as a means of addressing behaviour which is criminal in nature. What is problematic about under-criminalisation is that it undermines the normative distinction between the criminal law and every other form of regulation.[15] As the findings of this study illustrate, however, under-criminalisation should not be dismissed outright. This study found that on many occasions non-criminal measures, such as the injunction, were used to divert perpetrators away from criminality rather than introducing them to the CJS. Although at first sight this appears to be warranted, it has been concluded that in order for under-criminalisation to survive close scrutiny it is necessary for legal theorists to identify and defend a set of conditions under which non-criminal measures can justifiably be used to address criminal wrong, e.g. the kind of offences for which under-criminalisation can be used.

Finally, the crux of this thesis's original contribution lies with the means through which the indirect criminalisation of ASB can be prevented. As discussed earlier, although the implementation of the ASB tools and powers rarely resulted in the indirect criminalisation of certain kinds of behaviour, it was still necessary to examine various reform options through which this can be prevented in the future. The close analysis of the various reform options that can be implemented led to the conclusion that the most viable option is the introduction of a code of practice for local enforcement agents. At the core of this universally applicable code of practice will be the need to implement the ASB tools and powers in a manner that does not result in the indirect criminalisation of certain kinds of behaviour. To this end, the proposed code of practice should include policies which are informed by the findings of this study, particularly the three factors identified above which have led to the adoption of a social care driven approach with regard to ASB and low-level criminality.

[15] See 'The pre-2014 approach to anti-social behaviour'.

**Moving beyond this thesis: Future research**

Before concluding this research project, it is imperative to highlight some key issues which have not been fully addressed through this thesis and are worthy of further exploration in the future. First, although this study focused primarily on the injunction's first limb, it is important to investigate how other ASB instruments, such as the Community Trigger and the Community Remedy, have been implemented at a local level. Both the Community Trigger and the Community Remedy have been introduced as part of this more general shift towards a more victim-oriented approach with regard to ASB (Home Office, 2013). As the title of Part 6 of the 2014 Act indicates, these legal instruments aim to enhance local involvement and accountability. Although this study found a shift towards RJ processes which are victim-focused,[16] it is still necessary to examine how victims of ASB view their interaction with local enforcement agents and whether a truly victim-oriented approach has been adopted.

Secondly, as far as those who behave in an anti-social manner are concerned, it would be instructive to examine what the impact of this social care driven approach was on those individuals.[17] As most of the interviewees argued, focusing on the underlying causes of ASB is sometimes the only way to address this kind of behaviour. Thus, instead of imposing bland prohibitions, attention should be paid to how these underlying causes can be best addressed. Although at first sight this appears to be justifiable, it is imperative to examine whether local enforcement agents' endeavour to address these underlying causes has been effective or if it has perpetuated the perpetrator's position even further. An equally important task is to examine this from a perpetrator's perspective in order to investigate how they perceive the implementation of the injunction and whether this has indeed addressed the underlying causes of their behaviour

Thirdly, for criminal law theorists there remains the question as to whether the legislature can label measures which are susceptible to indirect criminalisation as non-punitive regardless of their stated objectives. As this thesis illustrated, although the prevention of certain undesirable outcomes appears to be a legitimate objective for the state to persue, it is possible for civil preventive measures to be implemented in a manner that results in the indirect criminalisation of certain kinds of behaviour. It is, therefore, necessary to determine whether the need for an early intervention should override the

[16] See 5.2.3.3.
[17] See 5.2.3.2.

potential misuse of these measures or whether certain mechanisms should be put in place in order to minimise the potential for indirect criminalisation. The formulation of a code of conduct similar to the one proposed by this thesis is a viable option which should not be overlooked.

Finally, after reflecting back on the findings of this study it was concluded that under-criminalisation should not be dismissed outright. As discussed above, [18] regardless of the theoretical challenges raised by this phenomenon, its potential benefits cannot be overlooked, such as diverting people away from criminality.[19] If this proposition is to survive close scrutiny though a more detailed theory of under-criminalisation is needed through which we must specify the kind of offences and offenders against whom this can be used.

**Concluding remarks**

ASB can be construed very widely depending on people's tolerance threshold, their personal circumstances, and their socio-economic background. Although it can sometimes be dismissed as too trivial and/or as part of everyday human interaction, it can severely disrupt people's lives and lead to their repeated victimisation. What can start as a minor argument between two neighbours over parking, can rapidly escalate to serious criminality with devastating consequences for both sides. For this reason, a flexible legal framework is needed through which local enforcement agents will be able to address behaviour that really has a negative impact on people's quality of life.

The need to address ASB swiftly and effectively can hardly be disputed. What is concerning about the current legislative framework though is that the ASB tools and powers can be implemented, at least in theory, in a manner that results in the indirect criminalisation of certain kinds of behaviour, albeit their official stated objectives (i.e. to prevent ASB and low-level criminality). Although in most of the cases explored within this study the implementation of the ASB tools and powers did not result in the imposition of criminal punishment, it seems appropriate to conclude this thesis by reiterating the need to introduce mechanisms, such as the proposed code of practice discussed earlier,

[18] See 6.2.2.

[19] It should be borne in mind that the findings of this study are representative of how the ASB tools and powers have been implemented in Site A and Site B. These findings should not be generalised as they might not be representative of how these measures have been implemented in other parts of England and Wales.

through which the indirect criminalisation of certain kinds of ASB can be prevented in the future.

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# Appendix A: Consent form for research participants

**Project Title:** Criminalisation, civil preventive measures and the creation of localised criminal codes

**Project Approval Reference:** ER/SD366/1

I agree to take part in the above University of Sussex research project. I have had the project explained to me and I have read and understood the Information Sheet, which I may keep for records. I understand that agreeing to take part means that I am willing to be interviewed by the researcher. Also, I give my consent for the interview to be audio taped by the interviewer.

I understand that a pseydonym will be used instead of my true identity in both the PhD thesis and in future publications in order to prevent my identity from being made public.

I understand that any information I provide is confidential, and that no information that I disclose will lead to the identification of any individual in the reports on the project by any other party.

I understand that my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without being penalised or disadvantaged in any way.

I consent to the processing of my personal information for the purposes of this research study. I understand that such information will be treated as strictly confidential and handled in accordance with the Data Protection Act 1998.

Name: …….

Signature: ……

Date: ……

# Appendix B: Participant information sheet

This is an invitation to participate in a research study which is part of the *'Anti-social Behaviour and Civil Preventive Measures: Creating Localised Criminal Codes?'* project. This research study will take place in the period between 01/05/2015 – 01/12/2015. This research is organised and funded by myself as a student of the Law, Politics and Sociology department of the University of Sussex as part of my PhD thesis. This research study has already been approved by the Social Sciences & Arts Cross-Schools Research Ethics Committee of the University of Sussex (Ref. number: ER/SD366/1). Before participating in this research, it is important for you to read carefully this information sheet in order to understand the nature and purpose of this research study.

The primary objective of this research is to examine the way in which civil preventive orders relating to anti-social behaviour are used by local authorities. It has been argued by many academics and non-governmental organisations, that the use of these orders constitutes a form of criminalisation. This claim, however, has not been tested empirically yet. This study will seek to test this assumption empirically and examine whether localised criminal codes have been created through the use of these measures.

As part of this research forty face-to-face interviews will be conducted. The primary intention of this research study is to interview twenty police officers and twenty local practitioners. Interviewees were chosen due to their experience and everyday interaction with civil preventive orders relating to anti-social behaviour.

Your participation in this research is absolutely voluntary and it is up to you to decide whether or not you will participate. If you would like to participate after reading this information sheet you have to sign the accompanied consent form. Even if you sign the consent form you can still refuse to participate either before or during the study.

If you eventually accept to participate in this research you will be asked to participate in an interview session which will last no longer than sixty (60) minutes. During this interview session you will be asked a number of questions relating anti-social behaviour orders and the way in which you use your powers granted to you through the relevant legislation.

I will use a voice-recording device in order to transform the interviews into transcripts through which I will be able to have a complete account of our discussion and prevent any ambiguities or misunderstandings. If, however, you object to the use of this voice-recording device I will be just taking notes during our discussion.

As to the potential disadvantages of participating in this research it has to be stated that the main disadvantage will be the time spent on the interview session. If the interview is not taking place within your institution transportation costs, if any, will be covered. Nonetheless, it should be borne in mind that through your participation you will provide some invaluable insight on the way in which those orders are used. Also, through your participation you will be able to reflect on what you are doing on a daily basis and have the opportunity to examine anti-social behaviour from an alternative perspective.

The results of this study will be used in my PhD thesis. Every piece of information collected during those interviews will be kept strictly confidential subject of course to any legal limitations. The true identity of the participants will be replaced by a unique identifier, a pseudonym, in order to avoid any potential adverse effects that this research might have on the participants. In addition, in my PhD thesis reference will be made only to participants' pseudonyms and not to their true identities. As part of this process a list of pseudonyms linked to participants' names will be created. However, this list will be stored securely and it will not be accessible by third parties. The list along with the recorded interviews will be deleted after successfully completing my PhD. Furthermore, it should be borne in mind that my intention is to publish my PhD thesis, either as a monograph or in separate chapters, in the future. Once again confidentiality will be preserved protecting participants' true identity.

If you agree to participate in this research study please sign the consent form and contact me in order to arrange an interview. For any further information or clarifications regarding this research please do not hesitate to contact me either through email (s.demetriou@sussex.ac.uk). If you have any concerns about the way in which this study has been conducted please conduct my supervisors, Dr. John Child (j.j.child@sussex.ac.uk) and Dr. Mark Walters (mark.walters@sussex.ac.uk).

Finally, I would like to thank you for the time spent reading this information sheet.

# Appendix C: Interview schedule

## Part A: Conceptualising anti-social behaviour

1. Could you describe briefly the work you do on a daily basis with regard to anti-social behaviour?
2. How would you define anti-social behaviour?

    2.1 Is there a specific definition of anti-social behaviour that you have to follow or is it up to you to decide?

    2.2 Are you aware of the legal definition of anti-social behaviour? Do you know what this definition is?

    2.3 Can you give me some examples of behaviour which you would describe as anti-social?

    2.4 How do you feel about 'the likely to cause' part of the statutory definition?

3. Who makes the decision to classify someone's conduct as anti-social behaviour?

    3.1 Does the public have any role in the way in which anti-social behaviour is defined in your local area?

    3.2 What is the role of the politicians in this?

4. Is there a consistent application in terms of definition?

5. To what extent, if any, is anti-social behaviour a social problem in your local area?

    5.1 To what extent does it affect local residents? Are you able to give any examples?

## Part B: The 2014 amendments

6. Are you aware that there have been recent changes to legislation on anti-social behaviour orders?

    6.1 What is your opinion about the possibility of imposing positive obligations?

6.2 How do you feel about the fact that breach of the order will not be an offence anymore?

6.3 What is your opinion on the extended definition of anti-social behaviour?

6.4 Do the changes have any effect on the way in which you deal with anti-social behaviour in your local area? If, so, in what ways?

6.5 Do you think that the current law is in need of further reform? If, so, how?

**Part C: The procedure followed**

7. Can you briefly describe the procedure you follow when applying for an injunction?

7.1 Is there a minimum number of incidents of anti-social behaviour needed before enforcement?

7.2 Do you use any pre-enforcement tools? If, so, what?

7.3 Is enforcement used as a last resort measure?

**Part D: Resorting to enforcement**

8. In your experience what are the most common types of restrictions that are imposed through an injunction?

8.1 How effective would you say these restrictions are in preventing further anti-social behaviour?

8.2 Are they proportionate?

8.3 Are there any other restrictions that you think should be used to prevent further anti-social behaviour? If, so can you give some examples?

8.4 How do you ensure that the terms of the injunction are not breached?

8.5 Do you inform the public when an injunction is issued against somebody?

9. What would you say is the primary purpose of using the injunction?

9.1 Is the injunction ever used for the purpose of punishing somebody for his or her anti-social behaviour?

10. Is the injunction ever used to prevent individuals from engaging in otherwise innocent activities? If, so, why?
11. What factors are used by the police/local enforcement agents to determine whether someone will be charged and prosecuted for an offence or whether the ASB will be dealt with through the injunction?

    11.1 Is the injunction ever used in order to avoid criminal prosecution? Can you explain why?